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Supreme Court, U.S.
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In the Supreme Court of the United States

LAWRENCE J. CASELLA, Petitioner,

v.

PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD, ET AL, Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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100 pp

QUESTIONS PRESENTED

The Pennsylvania Supreme Court adopted an attorney disciplinary rule mandating attorney participation in the Interest On Lawyer's Trust Account (IOLTA) program. Compliance with IOLTA conflicts with Petitioner's religious beliefs and the rights of his clients. Did the court of appeals properly grant the Pennsylvania Supreme Court legislative immunity for enforcement of the IOLTA rule? Did the court of appeals properly determine that the IOLTA Board proceedings had no impact on Petitioner's license to practice law?

PARTIES TO THE PROCEEDINGS

Petitioner is Lawrence J. Casella, a licensed Pennsylvania attorney. Respondents are Pennsylvania Interest On Lawyers Trust Account Board; Alfred Azen, Executive Director, Interest On Lawyers Trust Account Board; Gerald A. McHugh, Jr., Chairman, Pennsylvania Interest On Lawyers Trust Account Board; Thomas M. Thompson, Esquire; David E. Lehman, Esquire; Sallie Updyke Mundy, Esquire; Richard I. Thomas, Esquire; Harold I. Goodman, Esquire; Carl Oxholm, Iii, Esquire; Ernestine Watlington; Robert Burd; Disciplinary Board Of The Supreme Court Of Pennsylvania; John P. Flaherty, Chief Justice; Stephen A. Zappala, Justice; Ralph J. Cappy, Justice; Ronald D. Castille, Justice; Russell M. Nigro, Justice; Sandra Shultz Newman, Justice; Thomas G. Saylor, Justice

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-9a) is unreported. The opinion of the district court granting respondents' motion for summary judgment (App., *infra*, 10a-22a) is unreported. The opinion of the district court granting in part respondents' motion to dismiss (App., *infra*, 23a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2002. A petition for rehearing was denied on October 31, 2002. (App., *infra*, 1a-3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in the relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...", as applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Fifth Amendment to the United States Constitution provides in the relevant part that "...nor shall private property be taken for public use, without just compensation," as applicable to the states. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). The Fourteenth Amendment to the United States Constitution provides in the relevant part that "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

The pertinent provisions of the Pennsylvania Rule of Professional Conduct 1.15, Safekeeping Property, ("IOLTA Rule") are reprinted in an appendix to this petition. (App., *infra*, 56a-60a.) Also reprinted are various regulations implementing the IOLTA Rule.

STATEMENT OF THE CASE

State IOLTA programs have been controversial since their beginning.[1] The impetus for state IOLTA programs was a letter from the General Counsel of the Federal Reserve interpreting federal banking

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[1] *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. 2001) *cert. granted* __ U.S. __ (2002); and *Washington Legal Foundation v. Texas Equal Access To Justice Foundation*, 270 F.3d 180 (5th Cir. 2001)

regulations. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 161 (1998). Like its counterparts, the Pennsylvania Supreme Court, capitalized on this change, adopting Pennsylvania's IOLTA regulation. No. 252 Disciplinary Docket No. 3, 543 Pa. CXVII – CXXIV (App., *infra*, 71a)

The mechanics of the Pennsylvania IOLTA program are simple. The attorney must place the funds of his or her client into an interest-bearing account if the attorney judges the funds to be "qualified" according to the standards set forth in the IOLTA rule. Pa. R.P.C. 1.15(d) (App., *infra*, 57a) From time to time, the interest earned on these funds is transferred to the Pennsylvania IOLTA Board, a non-governmental 501(c)(3) entity, which is deemed to be the "beneficiary" of the property. Pa. R.P.C. 1.15(i) (App., *infra*, 60a) Thence, the IOLTA Board selects the ultimate beneficiaries of the fruits of the corpus. Pa. R.P.C. 1.15(h) (App., *infra*, 6a)

Initially, attorney compliance with IOLTA Rule was optional. It was subsequently amended the Rule to make compliance mandatory unless the attorney was granted an exemption. The IOLTA Board was vested with exclusive authority to grant or deny attorney exemption requests and with the responsibility of administration of the IOLTA program. Pa. R.P.C. 1.15(e) (App., *infra*, 58a)

While there are no automatic exemptions, an attorney may request an IOLTA exemption for, *inter alia*, "compelling and necessitous factors." Pa. R.P.C. 1.15(e) (App., *infra*, 58a). The IOLTA Board and the Supreme Court promulgated various rules governing the procedures for requesting and

exemption. 204 Pa. Code § 81.106 (e). (App., *infra*, 67a)

Petitioner has been a licensed attorney in Pennsylvania since 1986, chiefly engaged in the performance of real estate closings. The imposition of mandatory IOLTA compliance imposed religious, professional, and legal dilemmas on the Petitioner.

Clients pay Petitioner for his professional services, which includes protection of their property rights. Petitioner, like other all other attorneys, has taken an oath to uphold the law and the United States Constitution. Compliance with IOLTA would necessarily involve Petitioner in the violation of his client's Fifth and Fourteenth Amendment rights by taking their property without notice or consent. It would also involve Petitioner in a knowing and daily violation of his oath to uphold the United States Constitution.

The most fundamental right of a property owner is the right to dispose or not dispose of the property: "...one of the most essential sticks in the bundle of rights that are commonly characterized as property...the right to exclude others." *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, (1968). Pennsylvania property law is the same: "Consistent with our concepts of private property, is the notion that an important attribute of private ownership is the right not to use one's property, as one sees fit, without thereby losing ownership." *Sabados v. Kiraly*, 393 A2d 418, 258 Pa.Super. 532, (1978); *Lawson v. Simonsen*, 417 A.2d 155, 490 Pa. 509 (1980).

In *Phillips*, this Court summarized several ancient and fundamental principles of property law: 1) A property owner still owns the property even though it may be shown that it has no economic value to him or her. *Phillips*, 524 U.S., at 169; 2) A property owner's right to determine who does and who does not benefit from the use the property is so ancient, it is called a "fundamental maxim." *Phillips*, 524 U.S., at 167; and 3) the government may not seize a person's property even though it can proved that the cost in keeping it exceeds its value. *Phillips*, 524 U.S. at 170. [2]

The professional dilemma arises from the fact that while Petitioner is paid to protect a client's property interests, the IOLTA Rule requires an attorney to dispose of the client's property without notice to or consent of the actual owner. Moreover, even if the property owner somehow becomes aware of the proposed disposition of the property, IOLTA regulations prohibit the client, the property owner, from excluding the IOLTA Board from using his property. 204 Pa. Code § 81.106 (d). (App., *infra*, 67a).[3] The IOLTA regulations are not binding on

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[2] Petitioner's exemption request to the IOLTA Board was based, in part, on the Court's opinion in *Phillips*.

[3] 204 Pa. Code § 81.106:

> (d)Interest waived by beneficial owner: An exemption from IOLTA will not be granted based on an agreement between a lawyer and beneficial owner purportedly waiving the beneficial owner's right to interest or granting the lawyer the power to direct interest earned on fiduciary accounts to the lawyer or to another person of the lawyer's choice....

the clients, as he or she is not engaged in the practice of law.

According to the IOLTA Rule, no government entity ever owns or even possesses the corpus or the fruits thereof at any time: "The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P. L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P. L. 469, No. 117)" Pa. R.P.C. 1.15(i) (App., *infra*, 60a)[4] Through the IOLTA Rule, the Supreme Court, though never in title or possession of the property, exercises the right of a fee owner to include and exclude beneficiaries of the property, while denying that same right to the undisputed property owner.

Finally, the IOLTA Rule compels the attorney to adjudicate the rights of the "claimants" to the property without giving the property owner notification or any other rights of due process:

> Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify

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[4] Fla. Stat. § 28.33 in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), whereby the interest earned on an interpleader corpus "shall be deemed income of the office of the clerk of the circuit court." *Webb's*, 449 U.S. at 156, n. 1; *Phillips*, 524 U.S. at 166.

> the expense of administering a segregated account.

Rule 1.15(d)(1). (App., *infra*, 57a) *Fuentes v. Shevin*, 407 U.S. 67 (1972). The attorney is compelled to make a decision adverse to his or her client based solely on the economic benefit to a beneficiary selected by a stranger to the title. *Phillips*, 524 U.S., at 167.

Under the Pennsylvania IOLTA program, control of the property of one non-governmental entity, the client, becomes vested in another non-governmental entity, the IOLTA Board[5], for the benefit of a third set of non-governmental entities, IOLTA beneficiaries as selected by the Supreme Court, for the benefit of a fourth set of non-governmental entities, certain Pennsylvania citizens.[6]

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[5] The IOLTA Board is a non-governmental 501(c)(3) entity. In its annual 990 filing, the IOLTA Board represents that it receives it support from the "direct or indirect contributions from the general public" as defined in 26 U.S.C. §170(b)(1)(A)(vi) and §509(a)(1).

[6] The Fourteenth Amendment bars the government from taking private property of one person and giving it to another. *Missouri Pacific Ry. Co. v. State of Nebraska ex rel. Board of Transportation*, 164 U.S. 403 (1896):

> The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.

Since 1999, Petitioner has attempted to obtain IOLTA exemption from the IOLTA Board pursuant to the procedures set forth in the published rules. Petitioner's exemption request to the IOLTA Board raised two main issues: 1) that participation in the IOLTA program was an unlawful and unconstitutional taking of the client's property and 2) that participation would involve a violation of Petitioner's religious prohibition against taking another's property without consent, theft.

Petitioner requested an exemption from the IOLTA Board for the "necessitous and compelling factors," the main of which are set forth above. It is undisputed that the IOLTA Board did not give Petitioner a hearing or notice of a hearing. It is also undisputed that Petitioner's exemption request was "denied"[7] by an employee of the IOLTA Board, not by the IOLTA Board, Board members, or Board committee. (App., *infra*, 57a)

Subsequent to the action on Petitioner's exemption request, the Disciplinary Counsel initiated proceedings against Petitioner for alleged violation of the IOLTA Rule. These disciplinary proceedings were stayed by order of the Disciplinary Board on a motion by Petitioner.

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[7] The district and the circuit court characterized the employee's action as a "denial" of Petitioner's exemption request. (App., *infra*, 3a) The fact that the employee denied Petitioner's exemption request is not in dispute. (App., *infra*, 12a, n.1) The dispute focused on whether the employee's letter constituted a denial under the rules. Petitioner argued that it was not a denial because it was not the action of one authorized to take action under the rules and, on summary judgment, that whether it was a "denial" was a material fact.

Petitioner subsequently filed a complaint and amended complaint in District Court. It was alleged that the Pennsylvania Supreme Court was without jurisdiction to adopt such a rule since its purpose is to regulate clients and their property, not the practice of law.

It was also alleged that compliance with IOLTA regulations compelled Petitioner to violate the constitutional rights of his clients, his oath to uphold the United States Constitution, and basic precepts of his religious beliefs. Finally, it was alleged that the actions of the IOLTA Board members and employees violated Petitioner's right of due process of law. In addition to monetary relief, Petitioner sought declaratory and injunctive relief.

The District Court dismissed portions of the Complaint, having determined that the Pennsylvania Supreme Court was entitled to legislative immunity. (App., *infra*, 38a)

The remaining counts of conspiracy and denial of due process with respect to the conduct of the IOLTA Board exemption procedures were dismissed on motion for summary judgment. It was held that no property interest of the Petitioner was affected because the IOLTA Board had no authority to take any action regarding Petitioner's license to practice law. (App., *infra*, 16a) The Court of appeals upheld theses rulings of the district court.

REASONS FOR GRANTINGTHE PETITION

Petitioner's request for declaratory and injunctive relief was nullified by the court of appeals' determination that the Pennsylvania Supreme Court was entitled to legislative immunity.

The court of appeals' decision is in conflict with this Court's decisions in *Forrester v. White*, 484 U.S. 219 (1988) and *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980).

Prior to the issue of whether the Pennsylvania Supreme Court is entitled to legislative immunity comes the issue of whether it is entitled to any immunity at all. In *Forrester v. White*, 484 U.S. 219 (1988), this Court set forth the "functional approach" to questions of immunity:

> Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption in justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

Forrester, 419 U.S. at 224. The court is to examine 1) the nature of the function, 2) whether it was lawfully entrusted to the official or officials, and 3)

whether the act in question was an appropriate exercise of thereof.

The intent, purpose, and effect of the IOLTA Rule are not to regulate the practice of law but to raise money using client funds. Under the Pennsylvania Constitution, the Pennsylvania Supreme Court has regulatory authority over certain classes of persons described therein, including those engaged in the practice of law. Pennsylvania Constitution, Article V, Section 10. (App., *infra*, 70a) No regulatory authority is granted to the Supreme Court over the general citizenry, as that is vested in the General Assembly. Pennsylvania Constitution, Article II, Section 1. (App., *infra*, 70a)

By the Respondents' own account the purpose of the IOLTA Rule was not to regulate the practice of law but to raise money. The court of appeals agreed:

> [a]s the defendants properly note, 'IOLTA is simply one more means by which the Supreme Court and the bar support the broadest possible representation of Pennsylvania's citizens.'

(App., *infra*, 9a)

No provision of the Pennsylvania Constitution or any statute was cited that expressly or impliedly entrusts the Pennsylvania Supreme Court with any such function. The IOLTA Rule was an attempt to fulfill certain duties:

> But even if we were to assume that the pooling of minimal amounts of interest earned on client accounts constituted the regulation of client property, it is clear that the primary purpose of Rule

> 1.15 is to regulate the conduct of attorneys. As the Pennsylvania Rules of Professional Conduct note, "[e]very lawyer should support all proper efforts to . . . [provide] legal services" to the disadvantaged, emphasizing that the responsibility for providing such assistance "ultimately rests upon the individual lawyer." Pa. R.P.C. 6.1 (comment).

(App., *infra*, 8a). Under *Forrester*, this implies that an official can adopt a regulation, pursuant to an entrusted function, which changes or expands the nature of the function entrusted. However, by definition, this expanded function is not one entrusted to the official but one created by the official; the official cannot be the entrustor and the entrustee.

The purpose of the IOLTA Rule as formulated by the court of appeals is factually inaccurate. In *Phillips*, the United States, as *amicus curae*, argued that the fruit of the corpus, that is, the interest, was a "government-created value." This Court pointed out the basic flaw with this argument: "...the State does nothing to create value; the value is created by [the client's] funds." *Phillips,* 524 U.S., at 171.

Thus, even if the Pennsylvania Supreme Court was attempting to compel attorney support for representation of Pennsylvania citizens, the IOLTA Rule cannot possibly do so. The value is created by the client's property, not property owned by the lawyer, the bar association or the Supreme Court. There is no assumption that the IOLTA Rule regulates client property; it is a fact. Accordingly,

the more accurate statement of the purpose of IOLTA would be "IOLTA is simply one more means by which the Supreme Court compels an attorney's client to support the broadest possible representation of Pennsylvania's citizens." Again, the Pennsylvania Supreme Court is not entrusted with the function of regulating those not engaged in the practice of law, that is, clients.

The purpose of the IOLTA Rule was unequivocally expressed in the statute incorporated by the Supreme Court. According to the General Assembly, "The Interest on Lawyers Trust Accounts Act" was passed to create a "supplemental funding mechanism," not to regulate the practice of law. (App., *infra*, 9a) The Supreme Court's incorporation of The Interest on Lawyers Trust Accounts Act did not change its purpose.

In *Phillips*, this Court found that IOLTA programs were established not to regulate the practice of law but to use client's property to raise money: "Beginning with Florida in 1981, a number of States moved quickly to capitalize on this change in the banking regulations by establishing IOLTA programs." *Phillips*, 524 U.S. at 161.

While the letter from the General Counsel of the Federal Reserve may have changed federal banking law, it did not change state property law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). This administrative ruling cannot be used basis to change state property law, as the state cannot avoid the operation of the Fifth Amendment by changing the definition of property. *Phillips*, 524 U.S. at 167.

Under *Forrester*, the pertinent function entrusted to the Pennsylvania Supreme Court is the regulation of the practice of law. The purpose of

the IOLTA Rule, according to the history, logic and the Respondents' own assessment, is to regulate a client and his property, not to regulate the practice of law. Thus, under *Forrester*, the IOLTA rule is not an appropriate exercise of that function.

The court of appeals held that the IOLTA Rule regulated the conduct of attorneys: "...it is clear that the primary purpose of Rule 1.15 is to regulate the conduct of attorneys." That IOLTA regulates the conduct of attorneys is undeniably true by virtue of the fact that the Supreme Court codified it under the Rules Of Professional Conduct.

The Pennsylvania Constitution grants the Supreme Court the authority to regulate the conduct of attorney but only in the context of his or her practice of law. There must be a rational connection between the rule and the practice of law. *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

In the context of admission to practice law, this Court held that qualifications to practice law must have a rational connection with the practice of law:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. (citations omitted). Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying

> permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. (citation omitted)

Schware, 353 U.S., at 239.

Thus, any bar regulation, even an obviously unconstitutional one referred to *Schware*, would necessarily regulate the conduct of an attorney simply because it is in the Rules of Professional Conduct. It would do so until it is declared unenforceable and voided. If, however, the state supreme court is granted immunity based on the fact that the rule in question regulates the conduct of an attorney, the occasion to consider the connection between the rule and the practice of law will never arise.

The nature of the function entrusted has objective limits. If by regulation the official were able to delimit the nature of the function, then the official's authority would be unlimited. That is, if the practice of law is defined as whatever the supreme court regulates, no regulation can possibly fall outside that function by virtue of the fact that it is a regulation. When the citizens of Pennsylvania conferred upon the Supreme Court the function of the regulation of the practice of law, it was a function that had limits.

Forrester established a test to determine whether the grant of immunity is appropriate to avoid unnecessarily extending the scope of absolute immunity. In this case, the function entrusted was the regulation of the practice of law. However, the purpose of IOLTA is to use a client's property to

generate funds for other private citizens. The lack of the examination of the nature of the function entrusted and whether the IOLTA Rule was an appropriate exercise thereof leads to an infinite extension of absolute immunity.

Even if immunity was properly granted under *Forrester*, it was not properly applied with respect to declaratory and injunctive relief. This Court's holding in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) is controlling on the issue of legislative immunity of a state supreme court in its enforcement capacity.

In *Consumers Union*, a consumer organization brought an action against the Virginia Supreme Court and its chief justice for a declaration there had been a violation of the First and Fourteenth Amendments by promulgating and enforcing rules prohibiting attorney advertising. The Court held the court and its chief justice, although legislatively immune from claims regarding the adoption of the challenged rules, were properly held liable in their enforcement capacities with respect to declaratory and injunctive relief.

No subsequent case has extended legislative immunity to a state supreme court with respect to the enforcement of bar regulations. To the contrary, and specifically in the context of IOLTA litigation, the 5th Circuit addressed the question of legislative immunity and immunity for prospective relief. *Washington Legal Foundation v. Texas Equal Access To Justice Foundation*, 270 F.3d 180 (5th Cir. 2001). Following *Consumer's Union*, it held the Texas Supreme Court legislatively immune with respect to passage of the IOLTA rules, but liable

with respect to prospective relief. The court of appeals itself directed the district court to enter declaratory and injunctive relief. That legislative immunity is unavailable for declaratory and injunctive relief was again confirmed in *Forrester*, 484 U.S. 229-230.

In *Consumers Union*, this Court noted the history of this exclusion:

> If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.

Consumer's Union, 446 U.S. at 737.

The court of appeals determined that *Consumer's Union* was the proper precedent. Yet while acknowledging that a disciplinary enforcement proceeding was pending, the court of appeals extended the shield of legislative immunity to the enforcement proceedings. The court of appeals considered the pending disciplinary proceedings as unripe as it was uncertain if any action would be taken impinging on Petitioner's license. (App., *infra*, 6a, n. 5)

The fact that a party may subsequently be exonerated in an enforcement proceeding has never been considered a factor in whether or not

legislative immunity extends to that enforcement proceeding. This would go beyond the rationale set forth in *Consumers Union*: a plaintiff would not only have to wait to be prosecuted, but would have to wait to be prosecuted **and** wait have to wait for an adverse outcome before asserting constitutional rights.[8]

Such an expansion of the shield of legislative immunity would mean that a federal court could find that a bar regulation violates federal constitutional rights, as was the case in *Washington Legal Foundation* and *Consumers Union*, but is powerless to stop its implementation. This would result in situation where an attorney is subject to discipline for **not** violating his or her clients' rights.

The court of appeals' holding is contrary to this Court's holding *Virginia Consumers* in extending legislative immunity to enforcement proceedings.

According to the court of appeals, Petitioner abandoned claims made with respect to his religious beliefs. (App., *infra*, 7a, n. 5)

Petitioner's First Amendment free exercise claim was dismissed as a consequence of the grant of legislative immunity. Having ruled against Petitioner on such grounds, there was no consideration of the substance of Petitioner's allegation, that is, whether the IOLTA Rule was religiously neutral, whether the state had a compelling interest, and so on. *Church Of The*

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[8] The plaintiff in *Consumers Union* was not a member of the bar and thus would never be subject to state bar disciplinary proceedings.

Lukumi Babalu Aye, Inc., Et Al. v. City Of Hialeah, 508 U.S. 520 (1993).

It was likewise with respect to the substance of Petitioner's allegations regarding the Fifth and Fourteenth Amendment violations of the IOLTA Rule. In cases like *Bates v. State Bar Of Arizona,* 433 U.S. 350 (1977), *Virginia Consumers, Washington Legal Foundation v. Texas Equal Access To Justice Foundation,* 270 F.3d 180 (5th Cir. 2001), the parties sought to have the respective disciplinary rule declared to be in violation of the federal constitution and enjoin its enforcement. In this case, the application of legislative immunity to enforcement proceeding foreclosed substantive consideration of any of Petitioner's claims.

It is a matter of fact that the IOLTA Board itself had no authority to take direct action respecting Petitioner's license to practice law. That being so, the court of appeals held that the Petitioner was not entitled to any procedural due process rights whatever for matters involving the IOLTA Board. (App., *infra,* 5a)

While the IOLTA Board itself cannot take action *vis a vis* Petitioner's license, it has a key role in the disciplinary scheme, making decisions only it can make and on which the Disciplinary Board relies. The Supreme Court created the IOLTA Board through the IOLTA Rule. It adopted rules setting forth standards and procedures for the IOLTA Board in considering exemption requests.

The only action the IOLTA Board is authorized to take is to refer the attorney to Disciplinary Counsel:

> The Board will refer to the Office of Disciplinary Counsel the name, address

> and circumstances surrounding any lawyer who, not being exempted from the maintenance of an IOLTA account, fails or refuses to comply with Pa.R.P.C. 1.15(d) and these regulations.

204 Pa. Code § 81.110. (App., *infra*, 68a)

Such a referral involves judgment of the IOLTA Board on two material facts: 1) whether or not the attorney is exempted and 2) whether or not the attorney failed or refused to comply. However, those two facts are the only elements of the offense; the referral is merely forwarding of the case for execution of judgment.

That the IOLTA Board is the final arbiter of these facts is made clear in this case by the status of exemption. Petitioner alleged that an IOLTA Board employee took action on Petitioner's exemption request and represented to Petitioner that the action was taken by the IOLTA Board. According to the rules, the IOLTA Board may act on exemption requests and cannot delegate this authority to employees: "The Board may form a committee to determine exemptions from IOLTA or to reconsider exemption denials or determinations." 204 Pa. Code § 81.107 (d) (App., *infra*, 68a).

The fact that the employee actually took action on the Petitioner's exemption request has never been denied. Indeed, the district court (and the court of appeals) found it to be a fact:

> Casella actually argues that the application was never effectively denied because Azen himself denied the request, rather than the IOLTA Board.

(App., *infra*, 12a, n.1).

Petitioner never contended that an exemption has been granted, only that one has not been denied, a material fact in this case and in the Disciplinary proceedings. However, the IOLTA Board's referral to the Disciplinary Counsel (and subsequently to the Disciplinary Board) is conclusive on the matter of whether Petitioner is exempted, as the court of appeals itself concluded.

No other body is vested with the authority to make these decisions and no other body is vested with authority to review or alter the decisions of the IOLTA Board. The result is, is that when the case is before the Disciplinary Board the facts of "exemption" and "failure to comply" become irrefutable, irrespective of whether the exemption request was unlawfully denied. *Church Of The Lukumi Babalu Aye, Inc., Et Al. v. City Of Hialeah,* 508 U.S. 520 (1993).

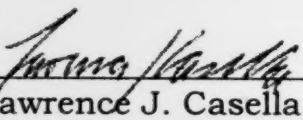
CONCLUSION

Grants of absolute immunity without a functional analysis would unnecessarily expand the scope of absolute immunity. Besides recognizing legislative immunity where it has never been recognized before, grants of legislative immunity to declaratory and injunctive for enforcement of a statute or regulation deprives parties' to challenge the constitutionality of any law.

Where an entity is properly granted quasi-judicial power by rule, it cannot operate in open disregard to those rules as it alone has the ability to make binding decisions.

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,



Lawrence J. Casella, Esquire
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 02-1141
LAWRENCE J. CASELLA,
Appellant
v.
PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD; ALFRED AZEN, EXECUTIVE DIRECTOR, INTEREST ON LAWYERS TRUST ACCOUNT BOARD; GERALD A. MCHUGH, JR., CHAIRMAN, PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD; THOMAS M. THOMPSON, ESQUIRE; DAVID E. LEHMAN, ESQUIRE; SALLIE UPDYKE MUNDY, ESQUIRE; RICHARD I. THOMAS, ESQUIRE; HAROLD I. GOODMAN, ESQUIRE; CARL OXHOLM, III, ESQUIRE; ERNESTINE WATLINGTON; ROBERT BURD; DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA; JOHN P. FLAHERTY, CHIEF JUSTICE; STEPHEN A. ZAPPALA, JUSTICE; RALPH J. CAPPY, JUSTICE; RONALD D. CASTILLE, JUSTICE; RUSSELL M. NIGRO, JUSTICE; SANDRA SHULTZ NEWMAN, JUSTICE; THOMAS G. SAYLOR, JUSTICE
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 00cv-01686

District Judge: The Honorable Donetta W. Ambrose

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and COWEN*, Circuit Judges

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Apellant having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active services, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:
/s/Maryanne Trump Barry
Circuit Judge

Dated October 31, 2002

* As to panel rehearing only.

APPENDIX B

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 02-1141
LAWRENCE J. CASELLA,
Appellant
v.
PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD; ALFRED AZEN, EXECUTIVE DIRECTOR, INTEREST ON LAWYERS RUST ACCOUNT BOARD; GERALD A. MCHUGH, JR., CHAIRMAN, PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD; THOMAS M. THOMPSON, ESQUIRE; DAVID E. LEHMAN, ESQUIRE; SALLIE UPDYKE MUNDY, ESQUIRE; RICHARD I. THOMAS, ESQUIRE; HAROLD I. GOODMAN, ESQUIRE; CARL OXHOLM, III, ESQUIRE; ERNESTINE WATLINGTON; ROBERT BURD; DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA; JOHN P. FLAHERTY, CHIEF JUSTICE; STEPHEN A. ZAPPALA, JUSTICE; RALPH J. CAPPY, JUSTICE; RONALD D. CASTILLE, JUSTICE; RUSSELL M. NIGRO, JUSTICE; SKDRA SHULTZ NEWMAN, JUSTICE; THOMAS G. SAYLOR, JUSTICE
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 00cv-01686

District Judge: The Honorable Donetta W. Ambrose
Submitted Under Third Circuit LAR 34(a) September 23, 2002
Before: BARRY, AMBRO, and COWEN, Circuit Judges (Opinion Filed: September 30, 2002)

OPINION

BARRY, Circuit Judge Pennsylvania attorneys who hold funds in escrow for their clients in non-interest bearing accounts are required to put those funds into an interest bearing account called an Interest On Lawyer Trust Account ("IOLTA account"). Pa. R.P.C. 1.15(d), 42 Pa.C.S.A. Interest earned on IOLTA accounts is pooled and distributed to legal service programs that provide assistance to the poor and disadvantaged. Pa. R.P.C. 1.15(h). Lawrence J. Casella, an attorney admitted to practice in Pennsylvania, sought an exemption from IOLTA participation pursuant to Pa. R.P.C. 15(e)(ii), claiming that the program required him to steal interest earned from the funds of his clients, and that such "thievery" was "deeply offensive to [his] religious beliefs." App. at 48.[1] His request for an exemption was denied.

Casella subsequently filed suit in federal court against the Pennsylvania Interest On Lawyer Trust Account Board ("IOLTA Board"), its individual members and executive director, the Disciplinary Board of the Supreme Court of Pennsylvania ("Disciplinary Board"), and the individual justices of

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[1] Casella also noted that "[w]hile the state forces [him] to get a license to earn [his] livelihood, [he] did not grant the state [his] soul in exchange for the 'privilege' of working." App. at 48.

the Supreme Court of Pennsylvania, alleging various violations of the U.S. Constitution. The District Court granted defendants' motion to dismiss as to several counts, and subsequently granted summary judgment in favor of defendants on all remaining counts. Because the parties are familiar with the underlying facts, we need not recite them in detail here.

On appeal, Casella only challenges two decisions of the District Court. First, he argues that the District Court improperly granted summary judgment in favor of the individual members and executive director of the IOLTA Board on his procedural due process claim under the Fourteenth Amendment. Second, he appeals the order of the District Court dismissing on the ground of legislative immunity his First Amendment freedom of religion claim against the individual justices of the Supreme Court.[2] We review grants of summary judgment de novo. *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002). We exercise plenary review over the District Court's order to dismiss on the ground of qualified immunity. *Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 773 (3d Cir. 2000). The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons that follow, we will affirm.

Casella first claims that the individual members and executive director of the IOLTA Board violated his right to procedural due process. It is well-settled

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[2] The District Court found that Casella's First Amendment claim only related to the individual justices of the Court. App. at 23.

that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Independent Enterprises Inc. v. Pittsburgh Water*, 103 F.3d 1165, 1177 (3d Cir. 1997) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)). Defendants concede that a license to practice law constitutes a property interest that deserves procedural due process protection. It is undisputed, however, that Casella still maintains his license to practice law; indeed, all proceedings before the Disciplinary Board have been stayed, apparently until this case is resolved. While Casella asserts that the referral of his case to the Disciplinary Board negatively affected his license, the Disciplinary Board has not acted, and there is no indication in the record that Casella's license is going to be revoked or in any way restricted.[3] Moreover, the executive director and members of the IOLTA Board do not have the authority to revoke Casella's license. And Casella concedes, as he must, that he has no right to or property interest in an exemption from IOLTA. Accordingly, we conclude that Casella has failed to allege a deprivation of a protected property interest

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[3] Casella is asking this Court to speculate about future events that may or may not affect his license to practice law. Under Article III, Section 2 of the U.S. Constitution, our jurisdiction is limited to cases and controversies. *Armstrong World Industry v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992). Related thereto, any claim that Casella may have in the future is not ripe for review.

and, thus, his procedural due process claim must fail. [4]

Casella next argues that the District Court erred when it dismissed, on the ground of legislative immunity, his First Amendment claim against the individual justices of the Supreme Court of Pennsylvania. We disagree. In 1996, the Court amended Rule 1.15 of the Pennsylvania Rules of Professional Conduct to establish the IOLTA program. Pa. R.P.C. 1.15(d) and (e). Before the IOLTA Board and the District Court, Casella argued that the amended rule violated his right to the free exercise of religion by compelling him to steal from clients.[5] It is recognized that judges may perform on occasion in limited circumstances (e.g., adopting a code of conduct) legislative functions, *Forrester v. White*, 484 U.S. 219, 227-28 (1988), and that when

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[4] Even if Casella had a protected property interest in the grant of an exemption, his procedural due process claim would fail. There is absolutely no evidence in the record that Board members violated any rules of procedure; indeed, if anyone did not comply with established procedures, it was Casella. After his request for an exemption was denied, Casella had 30 days to request reconsideration, which he failed to do. Notwithstanding his

inaction, the executive director gave Casella an additional 30 days to request reconsideration and to submit additional evidence supporting his request. Casella refused to do so and informed the IOLTA Board that he was preserving his right to sue in federal

court.

[5] Although Casella appears to have largely abandoned this argument on appeal, it appears at different points in his brief.

they do so, they may be entitled to legislative immunity. Id. at 228; *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-34 (1980). For an act to qualify as legislative in this Circuit, it must be (1) substantively legislative and (2) procedurally legislative. *Gallas*, 211 F.3d at 774. For substantially the reasons set forth by the District Court, we find that the amendment of Rule 1.15 and the resulting establishment of IOLTA was a legislative act and that the justices were protected by legislative immunity.

In an attempt to avoid this result, Casella argues that the Supreme Court exceeded its legislative authority when it amended Rule 1.15. Specifically, he claims that Rule 1.15 regulates the property of clients, not the conduct of lawyers, and this, according to Casella, the Court has no power to do. Separate and apart from the fact that this claim has nothing to do with the First Amendment and the "deeply offensive" violation of Casella's religious freedom, Casella cites no legal authority supporting the claim, and we are unaware of any. Accordingly, we find this claim to be wholly without merit. But even if we were to assume that the pooling of minimal amounts of interest earned on client accounts constituted the regulation of client property, it is clear that the primary purpose of Rule 1.15 is to regulate the conduct of attorneys. As the Pennsylvania Rules of Professional Conduct note, "[e]very lawyer should support all proper efforts to . . . [provide] legal services" to the disadvantaged, emphasizing that the responsibility for providing such assistance "ultimately rests upon the individual lawyer." Pa. R.P.C. 6.1 (comment).

Many lawyers in Pennsylvania choose to fulfill this professional duty by performing pro bono work. As the defendants properly note, "IOLTA is simply one more means by which the Supreme Court and the bar support the broadest possible representation of Pennsylvania's citizens." Appellees' Br. at 22. It is unfortunate that Casella does not support this opportunity to provide assistance to those in need. Public service, after all, is or at least should be an important part of the professional life of an attorney.

For the foregoing reasons, we will affirm the orders of April 24, 2001 and December 3, 2001.

TO THE CLERK OF THE COURT: Kindly file the foregoing Opinion.

/s/Maryanne Trump Barry
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAWRENCE J. CASELLA,
Plaintiff,
-vs- Civil Action No. 00-1686
PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD, et al,

Defendants.
AMBROSE, District Judge.

OPINION
AND
ORDER OF COURT

SYNOPSIS

Plaintiff, an attorney, contends that a Pennsylvania Rule of Professional Conduct which requires him to establish an Interest On Lawyer Trust Account ("IOLTA") for the deposit of client funds, violates his constitutional rights in several respects. Pending is the Defendants Motion for Summary Judgment (Docket No.14) seeking the entry of judgment in their favor on all remaining claims: Count Ill - a claim under the Fourteenth Amendment for the denial of procedural due process; Count IV - a claim under 42 U.S.C. §§ 1983, 1985(1) for a conspiracy to violate Fourteenth Amendment rights; and Count VI - a claim under the Fifth Amendment to the United States

Constitution and Article I, Section 10 of the Pennsylvania Constitution, for the unlawful taking of property without just compensation. The Motion is granted.

OPINION

Plaintiff, Lawrence Casella ("Casella") is an attorney licensed to practice in Pennsylvania. The Pennsylvania Constitution, as well as state statutes, grant the Pennsylvania Supreme Court the exclusive authority to regulate the bar and the practice of law. See Pa. Const. Art. 5 § 10(c) and 42 Pa. Cons. Stat. Ann. § 1722(a). Pursuant to this authority, the Pennsylvania Supreme Court promulgated rules governing the deposit of client funds. Rule of Profession Conduct 1.15, entitled "Safekeeping Property," provides that:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person

...

(d) Notwithstanding paragraphs (a), (b) and (C), and except as provided below in paragraph (e), a lawyer shall place all funds of a client or of a third person in an interest bearing account. All qualified funds received by the lawyer shall be placed in an Interest On Lawyer Trust Account in a depository institution approved by the Supreme Court of Pennsylvania. All other funds of a c1~ent or a third person received by the lawyer shall be placed in an interest bearing account for the benefit of the client or third person or in an other investment vehicle

specifically agreed upon by the lawyer and the client or third party.

(1) Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

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(B) A lawyer shall be exempt from the provisions of paragraph (d) only upon exemption requested and granted by the IOLTA Board. Pa. Rule of Professional Conduct 1.15. Participation in Rule 1.15 is mandatory.

Casella objects to Rule 1.15. He characterizes it as compelling theft of his clients' property which, he insists, is prohibited by his religion. Because of his religious views, Casella sought an exemption under Rule 1.15(e). The IOLTA Board denied the exemption[1], and referred the matter to the Pennsylvania Disciplinary Board, based upon Casella's refusal to establish an IOLTA account. The Disciplinary Board has not yet taken any action.

Casella then commenced this action against the IOLTA Board, its Executive Director Alfred Azen, the individual Board Members, the Disciplinary Board, and the individual justices of the Supreme Court of Pennsylvania. In the original Complaint, Casella asserted a claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ('RFRA")

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[1] Casella actually argues that the application was never effectively denied because Azen himself denied the request, rather than the IOLTA Board.

(Count I), a claim under the First Amendment for the violation of his right to the free exercise of religion (Count II); a claim under the Fourteenth Amendment for the denial of due process with respect to his application for exemption (Count III); a claim for conspiracy under42 U.S.C. §~ 1983 and 1985(1) (Count IV); and a claim under the Fourth Amendment based upon an alleged warrantless search (Count V). In a previous Opinion and Order, I granted the Defendants' Motion to Dismiss Counts I, II and V as to all Defendants, and to dismiss Count Ill as to the IOLTA Board. See Docket NO. 6. I also granted the Motion as it related to Casella's demand for attorney's fees. Casella subsequently filed an Amended Complaint which included another claim, one based upon the unlawful taking of property without just compensation.

Pending is a Motion for Summary Judgment (Docket No. 14). The Defendants seek the entry of judgment in their favor on the remaining claims: Count Ill (denial of due process); Count IV (conspiracy) and Count VI (Fifth Amendment of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution).[2] The Defendants insist that the due process claim is fatally flawed because Casella did not have a property interest deserving due process protection. Because the due process claim is not viable, the Defendants then reason, the conspiracy claim is also defective. As to the takings claim, tile Defendants urge that Casella lacks the standing necessary to pursue such a

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[2][Although Casella did not specifically label his "takings" claim as "Count VI," I will do so for ease of reference.

claim.[3] After careful consideration, and for the reasons set forth below, the Motion is granted in its entirety.

STANDARD OF REVIEW

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material when it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 (1986). Rule 56 mandates the entry of judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering a motion for summary judgment, the Court must examine the facts in the light most favorable to the party opposing the motion. *International Raw Materials. Ltd. V. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden

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[3] Because I find the Defendants' arguments to be persuasive, I need not address the other bases proffered for the entry of judgment.

by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the non- moving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

ANALYSIS

I. COUNT III– DUE PROCESS

In Count Ill, Casella contends that the Defendants violated his procedural due process rights. It is well established that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Independent Enterprise V. Pittsburgh Water*, 103 F.3d 1165, 1177 (3d dr. 1997), *quoting*, *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972). Thus, the threshold question is whether Casella has a property or liberty interest deserving due process protection.

Casella responds that he does. According to Casella, he has a property interest in his attorney license. See Docket No. 29, p. 8 (stating, "[t]he Complaint plainly alleged Plaintiff's property interest was in the license to practice law.").[4] The

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[4] Initially, there was some confusion over whether Casella claimed a property interest in the "grant" of an exemption. However, because he now clearly states that "Plaintiff never claimed to have a property interest in the grant of an

Defendants concede that an attorney license constitutes a property interest deserving procedural due process protection. See Docket No. 15, p. 6.

Consequently, the focus thus shifts to whether the Defendants deprived Casella of his property interest, and whether they did so without procedural due process. Simply stated, they did not. Casella still maintains his attorney license. This fact is undisputed, as is the fact that the Defendants have no authority over the revocation of the license. Rather, the Defendants merely denied Casella an exemption from the IOLTA rules. Under IOLTA operating guidelines, the Defendants then referred the matter to the Pennsylvania Disciplinary Board. It is the Disciplinary Board which has the authority to deprive Casella of his license. The Disciplinary Board is not a party to this action. Further, there is no indication that the denial of an exemption from IOLTA Rules results in any sort of mandatory revocation of an attorney license.

Because Casella has not been deprived of a property interest, and indeed because the Defendants do not have the authority to deprive Casella of his property interest, the Defendants cannot have violated Casella's procedural due process rights. The Motion for Summary Judgment is granted as to count iii, and judgment is hereby entered in favor of the Defendants.

II. COUNT IV- CONSPIRACY

In Count IV, Casella argues that the Defendants conspired to deprive him of his procedural due

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exemption," *see* Docket No. 29, p. 8. I will limit my analysis to the issue of the attorney license.

process rights. The Defendants argue that, because Casella's procedural due process claim is no longer viable, judgment must be entered in their favor on the conspiracy claim as well. I agree. Without the actual deprivation of a constitutional right, there can be no liability for conspiracy under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(1). *See Holt Cargo Systems. Inc. v. Delaware River Port Authority*, 20 F. Supp.2d 803, 842 (E.D. Pa. 1998). Consequently, the Motion for Summary Judgment is granted as to Count IV. Ill. Count VI -

III. COUNT IV- TAKING WITHOUT JUST COMPENSATION

As previously stated, Casella filed an Amended Complaint through which he sought to allege a "takings" claim. Because the Amended Complaint was filed after the Opinion and Order issued in connection with the Motion to Dismiss, 1 have not previously considered the parameters of this claim. The Amended Complaint contains the following allegations:

118. The monies received and generated by the IOLTA Board under Rule of Professional Conduct 1.15(i), as interest generated on client funds, is not property belonging to the Commonwealth of Pennsylvania or the United States. **

122. Rule of Professional Conduct 1.15(i) is in violation of Plaintiff's client's rights under Article I, Section 10, of the Pennsylvania Constitution: "...nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured...

123. Rule of Professional Conduct 1.15(i) is in violation of Plaintiff's client's rights under the Fifth

Amendment of the United States Constitution by taking Plaintiff's clients property without paying just compensation.

See Amended Complaint, 11118, 122, 123.

Based upon these allegations, it appears that the property allegedly "taken" consists of the client funds placed in the IOLTA accounts.[5] The Defendants argue that Casella lacks the standing necessary to pursue a takings claim where the property at issue is not his. I agree. Although research did not reveal any Third Circuit court cases addressing this precise issue, I do have the benefit of another federal courts decision involving IOLTA procedures. I find this decision to be persuasive.

In *Washington Legal Foundation v. Legal Foundation of Washington*, CIV. No. 98-351 54, 2001 WL 1412787 (9th Cir. Nov. 14, 2001), a number of plaintiffs challenged rules implementing IOLTA accounts in the State of Washington. Two of the plaintiffs regularly purchased real estate and had their money escrowed in IOLTA accounts. Because these individuals owned the principal placed in the accounts the court concluded that they had standing to pursue a takings claim.

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[5] A conflict exists between the allegations in the Amended Complaint and Casella's Brief, as to whether the property "taken" here consists of either the interest generated on the clients' funds see Amended Complaint, paragraph 118. or of the underlying principal itself see Docket No. 29, p. 16. Obviously, the allegations set forth in the Amended Complaint would govern. However, the conflict is meaningless, given that both items referenced clearly belong to Casella's clients, not to Casella.

The Ninth Circuit reached a different conclusion, however, with respect to the two remaining individual plaintiffs. One plaintiff, Daubs, served as the vice-president of an escrow company. His company provided escrow services to buyers and sellers engaged in real estate transactions. The escrow company held legal title to the funds placed in escrow - here - the IOLTA accounts. The court rejected Daub's argument that, as legal titleholder, he had standing to assert a takings claim. The court stated:

> [a]lthough Daubs may have legitimate objections to the IOLTA program and may believe his clients are better served by disregarding its dictates, he does not own the principal that is deposited in the IOLTA accounts, and therefore, he has no claim to the generated interest. Without the requisite property right, Daubs lacks standing to challenge the IOLTA program on Fifth Amendment grounds.

Washington Legal Foundation, 2001 WL 1412787 at * 8.

The court reached a similar determination with respect to the other individual plaintiff. Like Daubs, Maxwell worked for an escrow services company. However, she based her claim of standing, not on legal title to the funds, but on her surrender of a Limited Practice Officer ("LPO") license. An LPO license permits a state-licensed nonlawyer to fill out routine real estate transaction documents. The IOLTA rules had been amended so as to apply to LPO5 as well as attorneys. Maxwell's employer

decided to eliminate any LPO5 from its payroll, rather than pay any costs associated with IOLTA rules. As such, Maxwell surrendered her license.

In finding that Maxwell lacked standing, the Ninth Circuit court first observed that Maxwell did not own the principal placed in the IOLTA accounts. It then acknowledged that Maxwell may have been adversely affected by application of the IOLTA rules, but concluded that the loss of her license was an indirect result of her employer's independent action. The court reasoned that even if LPO5 were declared exempt from IOLTA rules, Maxwell would not receive relief unless her employer made an independent decision to place LPOs back on the payroll. Accordingly, the court held that:

not only was she properly denied relief by the district court on the ground that she had no property right to the generated interest, but because she has not shown that eliminating Rule 12.1 will redress her injury, she lacks standing to challenge the IOLTA program on Fifth Amendment grounds.

Id. (citations omitted).

I find Casella's position to be analogous to those individual plaintiffs denied standing in Washington Legal Foundation. Casella, like Daubs and Maxwell, cannot claim ownership either of the principal placed in the IOLTA accounts or of the interest generated therefrom. Indeed, Casella acknowledges in the Amended Complaint that the property at issue is his clients', not his.

Casella's attempt to distinguish the Washington Legal Foundation case based upon the "unique relationship" between an attorney and client is unpersuasive. Casella argues that, as an attorney,

his duty to his client is to communicate in an effective manner and to protect interests. Casella reasons that, if he is to comply with this duty while at the same time complying with the IOLTA Rules, he would have to counsel his clients to retain another attorney and sue both him and the IOLTA Board for stealing the client's money. It is this impact upon the attorney-client relationship which Casella believes forms a basis for a finding of standing. I disagree. The "effect" here is even more tenuous and tangential than the "effect" rejected by the Ninth Circuit Court in Washington Legal Foundation - that is, the loss of an LPO license. Further, Casella offers no case law in support of tile notion that an attorney has standing to pursue, on his own behalf, a claim properly belonging to his client, based simply on the nature of the attorney-client relationship. Any takings claim should be asserted, if at all, by the clients, not Casella.

Because Casella lacks the standing necessary to pursue this takings claim, the Motion for summary Judgment is granted as to Count VI.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAWRENCE J. CASELLA,
Plaintiff,

-vs- **Civil Action No. 09 1686**

PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD, et al,

Defendants.

AMBROSE, District Judge.

ORDER OF COURT

And NOW, this 15th day of December, 2001, after careful consideration, and for the reasons set forth in the accompanying Opinion, the Defendants' Motion for Summary Judgment (Docket No. 14) is GRANTED. The Clerk of Courts is hereby directed to mark this case "CLOSED" forthwith.

BY THE COURT:
/s/ Donetta W. Ambrose
Donetta W. Ambrose, U.S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAWRENCE J. CASELLA,
Plaintiff,
-vs- **Civil Action No. 00 1686**

PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD, et al,

Defendants.
AMBROSE, District Judge.

SYNOPSIS

Pending is Defendants' Motion to Dismiss Plaintiff's entire Complaint (Docket No. 2). Plaintiff has filed a Brief in Opposition (Docket No. 6). After careful consideration of the submissions of the parties, and based on my Opinion set forth below, said Motion is granted in part and denied in part.

OPINION
AND
ORDER OF COURT

I. BACKGROUND

Plaintiff, Lawrence Casella, a Pennsylvania attorney, filed this lawsuit against the Pennsylvania Interest on Lawyer Trust Accounts Board ("IOLTA Board"), its Executive Director Alfred Azen, the

individual IOLTA Board members, the Disciplinary Board of the Supreme Court of Pennsylvania ("Disciplinary Board") and the individual justices of the Supreme Court of Pennsylvania. The Complaint sets forth five (5) counts. Count I of the Complaint alleges a violation of the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, et seq. against the Pennsylvania Supreme Court Justices, the IOLTA Board and its members. Count II of the Complaint alleges that Plaintiff's First Amendment right to religious freedom has been violated. Specifically, Plaintiff alleges that Rule 1.15 of the Pennsylvania Rules of Professional Conduct, which implemented the IOLTA program in Pennsylvania, violates Plaintiff's religious beliefs because the rule compels him to take his clients' money. Count III alleges a Fourteenth Amendment due process violation by the IOLTA Board, its members and its Executive Director. Count IV of the Complaint alleges that the individual IOLTA Board members and its Executive Director conspired to injure Plaintiff and his property in violation of 42 U.S.C. §1983 and 1985(1). Finally, Count V of the Complaint alleges that the IOLTA Rules violate his Fourth Amendment right to be free from warrantless searches. As a result of said allegations, Plaintiff seeks compensatory and punitive damages against the IOLTA Board and Azen. In addition, Plaintiff has requested that this Court stay the disciplinary proceedings pending against him, temporarily and permanently enjoin the members of the Supreme Court of Pennsylvania from adopting or enforcing any rules requiring attorneys to violate their religious beliefs, and

award him costs and attorneys fees pursuant to 42 U.S.C. §1988.

Defendants have filed a Motion to Dismiss Plaintiff's entire Complaint (Docket No. 2). Plaintiff has filed a Brief in Opposition (Docket No. 6).

II. LEGAL ANALYSIS

A. Request for Document Review

As an initial matter, I must determine the extent of my consideration of the material submitted by Plaintiff. In opposition to Defendants' Motion to Dismiss, Plaintiff attaches to his Brief the following documents:

> 1. A table presumably prepared by Plaintiff comparing Defendants' enumeration of procedural safeguards of Disciplinary Proceedings and Plaintiff's allegations of procedural deficiencies of the IOLTA Board's adjudication of Plaintiff's exemption request (Exhibit A); and
>
> 2. Selected portions of a transcript from a hearing on a motion to compel production of documents and to disqualify counsel held on August 18, 2000, in the matter of *Office of Disciplinary Counsel v. Casella*, #C4-00-263 (Exhibit B1-B6).

Generally, in considering a motion to dismiss based on Rule 12(b)(6), a district court may not consider matter "outside the pleading." FED. R. CIV. P. 12(b)(6). Pleadings are defined by the Federal Rules to include a complaint, an answer, a

reply to a counterclaim, an answer to a crossclaim, a third-party complaint, and a third-party answer. FED. R, CIV. P. 7(a). Thus, when ruling upon a 12(b)(6) motion, a district court is limited to considering the facts as they are alleged in the complaint, anything properly attached thereto and matters of public record.[1] FED. R. CIV. P. 12(b)(6); 10(c). Exhibit A is merely a summary table setting forth Defendants' positions and Plaintiff's positions. The information contained therein is already contained in either the Complaint or the Briefs of the parties. Therefore, I will consider Exhibit A.

Exhibit B, on the other hand, is wholly extraneous to the pleadings. *See Raquel v. Educ. Management Corp.*, 196 F.3d 171,177 (3d Cir. 1999); *see also Transport Indem. Co. v. Home Indem. Co.*, 535 F,2d 232 (3d Cir. 1976). It introduces matters into the case that go beyond the Complaint, does not contain information for which I can take judicial notice and is not a matter of public record. *Pension Benefit Guar. Corp., v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196-97 (3d Cir. 1993). Therefore, I will not consider Exhibit B in my determination of the pending Motion to Dismiss.

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[1] For purposes of a 12(b)(6) motion, the Third Circuit has defined public records to include criminal case dispositions such as convictions or mistrials, letter decisions of governmental agencies and published reports of administrative bodies. *Pension Benefit Guar. Corp., v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1197 (3d Cir. 1993). Based on this definition, none of the documents submitted by the parties herein fit into the category of public records.

B. Standard of Review

In deciding a Motion to Dismiss all factual allegations, and all reasonable inference therefrom, must be accepted as true and viewed in the light most favorable to the plaintiff. *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1988).

I may dismiss a compliant only if it appears beyond a reasonable doubt that the plaintiff can prove no set of fact in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In ruling on a motion for failure to state a claim, I must look to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn*, 838 F.2d at 666.

While a court will accept well-pleaded allegations as true for the purposes of the motion, it will not accept legal or unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *See, Miree v. DeKalb County, Ga.*,433 U.S. 25, 27 n. 2 (1977). Moreover, the plaintiff must set forth sufficient information to outline the elements of his claims or to permit inferences to be drawn that these elements exist. See, Fed. R. Civ. P. 8(a)(2); *Conley*, 355 U.S. at 45-46. Matters outside the pleadings should not be considered. This includes "any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings." Charles A. Wright, Arthur R. Miller. Federal Practice and Procedure §1366 (West 1990).

C. Count I- Religious Freedom Restoration Act, 42 U.S.C. §2000bb, et seq.

In Count I of the Complaint, Plaintiff alleges that his rights pursuant to the Religious Freedom Restoration Act ("RFRA") have been violated. 42 U.S.C. §2000bb, et seq. The RFRA provides:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exceptions
>
> Government may substantially burden a person's exercise of religions only it if demonstrates that application of the burden to the person-
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1. Attempting to follow the meaning of the RFRA, Plaintiff's Complaint specifically alleges that compliance with the IOLTA rules "substantially burdens his right to exercise his religion" and that none of the Defendants have demonstrated that the government has a compelling governmental interest in enforcing the IOLTA rules. See, Complaint 69-72. Therefore,

Plaintiff avers that his rights pursuant to the RFRA have been violated. 42 U.S.C. §2000bb, et seq.

In their Motion to Dismiss, Defendants contend that the RFRA has been declared unconstitutional by the United States Supreme Court. *See, Boerne v. Flores*, 512 U.S. 507 (1997). Thus, Defendants argue that Plaintiff has no rights under the RFRA and is, therefore, entitled to no relief under the RFRA.

My research of the RFRA has revealed that while it is true that the Supreme Court has ruled the RFRA to be unconstitutional, the Circuit Courts are split on whether the RFRA is unconstitutional in its entirety or whether it is unconstitutional only as it applies to state and local governments and their laws. *Compare, Hartmann v. Stone*, no 97-5269, 1998 WL 415999, at *4 n.1 (6"' Cir. July 7, 1998); *Peterson v. Shanks,* 149 F.3d 1140, 1145 (10th Cir. 1998); and *Sutton v. Providence St. Joseph Med. Center*, 192 F.3d 826, 831-32 (9th Cir. 1999); with *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 858 (8"' Cir. 1998). The Third Circuit has yet to rule on this issue. *See, Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999); *In re The Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999). Regardless, at the very least, *Boerne*, *supra*, stands for the proposition that the RFRA is unconstitutional as it applies to state and local governments and their laws. *In re Grand Jury*, 171 F.3d at 829. In other words, states and local governmental bodies are no longer bound by any RFRA to exempt the religiously devout from neutral laws of general applicability. Boerne, supra.

Here, Count I of Plaintiff's Complaint relates to the IOLTA rules and not to the federal government. Consequently, Plaintiff is not entitled to recovery pursuant to this theory under the RFRA. Boerne, supra. Plaintiff does not oppose this conclusion in his Brief in Opposition. As a result, Count I of Plaintiff's Complaint is dismissed.

D. Count II- First Amendment (Religion)

Count II of the Complaint asserts that the Pennsylvania Supreme Court[2] may not violate his First Amendment right to exercise his religion. See, Complaint, ¶¶87-88. Specifically, the Complaint alleges that the Supreme Court has no jurisdiction over Plaintiff's clients or their property and therefore "cannot pass a disciplinary rule depriving one of CASELLA's client (sic) from directing him to put that client's funds in a non-interest bearing account." See, Complaint, ¶89. At issue is Rule 1.15 of the Pennsylvania Rules of Professional Conduct, which implemented the IOLTA program in Pennsylvania.[3] Rule 1.15 provides, in pertinent part, as follows:

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[2] Since Plaintiff has not sued the Pennsylvania Supreme Court, but instead has sued the individual justices, I am going to construe the Complaint most broadly and assume that Plaintiff intended Count II to related to the individual justices of the Pennsylvania Supreme Court.

[3] The IOLTA program was originally initiated in Pennsylvania in 1988. On July 17, 1996, the Supreme Court of Pennsylvania issued an order that made the IOLTA program mandatory. In doings so, the Supreme Court created the Pennsylvania IOLTA Board, which administers the Pennsylvania IOLTA program.

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person ....

* * *

(d) Notwithstanding paragraphs (a), (b) and (c), and except as provided below in paragraph (e), a lawyer shall place all funds of a client or of a third person in an interest bearing account. All qualified funds received by the lawyer shall be placed in an Interest On Lawyer Trust Account in a depository institution approved by the Supreme Court of Pennsylvania. All other funds of a client or a third person received by the lawyer shall be placed in an interest bearing account for the benefit of the client or third person or in an other investment vehicle specifically agreed upon by the lawyer and the client or third party.

(1) Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for

> such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.
>
> * * *
>
> (e) A lawyer shall be exempt from the provisions of paragraph (d) only upon exemption requested and granted by the IOLTA Board...

Participation in Rule 1.15 is mandatory. See, Rule Prof. Cond. 1.15(d) and (e), as amended 1996; 62 P.S. §4024(a). Thus, Plaintiff argues that Rule 1.15 regarding IOLTA's amounts to "theft" which "is prohibited by his religion." See, Complaint, 79. As a result, Plaintiff suggests that the amendments to Rule 1.15 violate his First Amendment Right to exercise his religion.

Defendants argue that Count II of the Complaint should be dismissed based on three reasons: (1) the IOLTA Rules do not mandate Plaintiff to "steal from his clients" in contravention of his religious beliefs, (2) The members of the Supreme Court are entitled to legislative immunity and its agents are entitled to quasi legislative immunity, and (3) the *Younger* abstention applies. Plaintiff opposes each theory. As I believe that legislative immunity is a threshold issue, I will address that argument first. To the extent necessary, I will then address the other arguments.

1. Legislative immunity as it relates to the Supreme Court of Pennsylvania

Defendants claim they are immune from suit because in amending the IOLTA Rule, Rule 1.15, they were acting in a legislative capacity. *Consumers Union*, 446 U.S. at 731-34. Legislative immunity provides a complete defense to claims for injunctive and declaratory relief. *Supreme Court of Virginia v. Consumers Union of the Untied States*, 446 U.S. 719, 730-34 (1980).

Historically, legislative immunity was developed to provide immunity for legislators. *Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 773 (3d Cir. 2000). To determine whether an official is entitled to legislative immunity, a court should focus on the "nature of the official's action rather than the official's motives or the title of his or her office." *Gallas*, 211 F.3d at 773. Sometimes judges perform legislative acts and, therefore, are entitled to legislative immunity for those acts, as well. *Gallas*, 211 F.3d 773, *citing*, *Forrester v. White*, 484 U.S. 219, 227 (1988)(noting a distinction "between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform"); *Consumers Union*, 446 U.S. at 734 ("[T]he Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code."). The Third Circuit uses a two part test to determine if an act by the Supreme Court of Pennsylvania is legislative thereby warranting immunity. *See, Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760 (3d Cir. 2000), *citing*, *Ryan v. Burlington County*, 889 F.2d 1286 (3d Cir. 1989). For an act to be legislative, it must be both substantively and procedurally legislative. *Id.* at

774. Therefore, to determine if the act of amending Rule 1.15 is legislative in nature, I must analyze it pursuant to said test.

a. Substantively legislative

To be substantively legislative, an act must involve policy making decisions of a general scope. *Gallas*, 211 F.3d at 774. If the decision affects just a nominal number of individuals, the act is considered to be administrative rather than legislative. *Id.*, *quoting Ryan*, 889 F.2d at 1290-91. Defendants argue that the amendment of the IOLTA Rule was a substantively legislative act because the rule reflects a large policy changing decision on the part of the Court affecting a large number of people. I agree.

It is clear that the amendment of Rule 1.15 was a policy making decision of the Supreme Court of Pennsylvania. The Supreme Court was acting pursuant to its constitutional and statutory authority to "prescribe general rules governing practice, procedure and conduct...to practice law..." when it established the IOLTA Rule. Pa. Const. Art. V, §10(c); 42 Pa. C.S.A. §1722(a)(1). I agree with Defendants that this is the same type of function the Pennsylvania General Assembly performs when it passes legislative enactments. Pa. Const. Art. II, §1; Gallas, 211 F.3d at 774, n.4 ("It is clear that the Pennsylvania Constitution's broad grant of authority empowers the Supreme Court to make not only 'administrative ' decisions but also discretionary, policymaking decisions of a 'legislative' nature ....").

In addition, Rule 1.15 applies to all attorneys in Pennsylvania who hold a client's or a third party's

funds. If the funds of the client or third party are qualified funds,[4] the funds must be placed in an IOLTA account. If the funds are not qualified funds, then the funds are required to be placed in an interest bearing account for the benefit of the client or third party. Rule Prof. Cond. 1.15(d). No attorney is exempt from Rule 1.15, unless an exemption is sought and received. Rule 1.15(e). Urging the opposite conclusion, Plaintiff argues that the Supreme Court's action in promulgating Rule 1.15 did not involve a matter of general policy, but instead targeted him. See, Brief in Opposition, p. 9. Plaintiff offers no support for this bold assertion. Simply put, I find this argument to be baseless. I conclude, therefore, that the enactment of Rule 1.15 was a substantively legislative act. Consequently, I find that the first element of the legislative test has been met.

b. Procedurally legislative

To be procedurally legislative, an act must be passed by means of established legislative procedure. *Gallas*, 211 F.3d at 774. "This principle requires that constitutionally accepted procedures of enacting the legislation must be followed in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve." *Id.*,

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[4] Rule 1.15(d) defines qualified funds as monies received by a lawyer in a fiduciary capacity, that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

quoting Ryan, 889 F.2d at 1290-91. Defendants argue that the amendment of the IOLTA Rule was a procedurally legislative act because the Supreme Court followed an established procedure. I agree.

In amending Rule 1.15, the Supreme Court was acting pursuant to its authority under the Pennsylvania Constitution. Pa. Const. Art. V, §10(c). Specifically, §10(c) vests the Supreme Court with the authority to regulate the admission to the bar as well as the practice of law in the Commonwealth. The Supreme Court's power is also rooted in 42 Pa. C.S.A. §1722(a)(1), which provides that the Supreme Court has the power to "prescribe and modify general rules governing ...[the] practice [of] law." Rule 103 of the Pennsylvania Rules of Judicial Administration provides for the procedure for the adoption, filing and publishing of rules. In particular, Rule 103(a)(3) provides:

A proposed rule may be promulgated even though it has not been previously distributed and published in the manner required by subdivisions (1) and (2), where exigent circumstances require the immediate adoption of the proposal; or where the proposed amendment is of a typographical or perfunctory nature; or where in the discretion of the Supreme Court such action is otherwise required in the interests of justice or efficient administration.

It was through this process that the Supreme Court of Pennsylvania adopted the IOLTA amendments to Rule 1.15 of which the Plaintiff now complains. See, No. 252 Disciplinary Docket No. 3 (Order of July 17, 1996). Thus, the Supreme Court followed the accepted, statutorily prescribed procedures when it amended the IOLTA Rule making it mandatory. Therefore, the process was

procedurally legislative and satisfies the second prong of the legislative immunity test.

In opposition, Plaintiff asserts that Defendants' argument is faulty because "the Pennsylvania Supreme Court's constitutional and statutory authority to regulate the practice of law is without limits. That is, whatever is regulated by the Pennsylvania Supreme Court under its authority to regulate the practice of law is the practice of law because it is regulated by the Pennsylvania Supreme Court under its authority to regulate the practice of law." *See*, Brief in Opposition p. 8. I am not quite sure what the Plaintiff is attempting to argue. However, in an effort to address this statement, I am again guided by the Pennsylvania Constitution which limits the regulating power of the Pennsylvania Supreme Court to, inter alia, the practice of law. Pa. Const. Art. V, §10(c). In addition, the legislative test set forth by the Third Circuit requires that the regulations be enacted pursuant to established legislative procedure. Gallas, 211 F.3d at 774. If they do not, then the Court is not entitled to legislative immunity. As set forth above, the acts of the Supreme Court in amending Rule 1.15 do comply with established legislative procedures. Therefore, I do not find Plaintiff's statement to be meritorious.

Plaintiff makes several additional statements regarding legislative immunity. See, Brief in Opposition, pp. 6-9. With the exception of the statements noted above, none of the statements made by Plaintiff relate to the legislative test set forth by the Third Circuit. Therefore, I find the statements to be irrelevant to my determination.

As a result, the Supreme Court of Pennsylvania is entitled to legislative immunity as it relates to the amendments of Rule 1.15 of the Pennsylvania Rules of Professional Conduct. Since I find that Count II only relates to the individual Justices of the Pennsylvania Supreme Court, Count II of Plaintiff's Complaint is dismissed in its entirety.[5]

E. Count III- Fourteenth Amendment (Due Process)

In Count III of the Complaint, Plaintiff alleges that his Fourteenth Amendment due process rights have been violated by the IOLTA Board, its members and its Executive Director. Specifically, Plaintiff alleges that the IOLTA Board's procedures for granting exemptions violated Plaintiff's due process. Defendants assert that Count III should be dismissed based on a *Younger* abstention. See, *Younger v. Harris*, 401 U.S. 37 (1971). In short, a *Younger* abstention is applicable where a federal court abstains from ruling on federal issues in deference to ongoing state proceedings. *Id.*; *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). There is a three part test to determine if a Younger abstention is warranted:

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[5] Even if I were to find that Count II relates to any other Defendant, I would still dismiss Count II in its entirety on the basis of quasi-legislative immunity. See, Gallas, 211 F.3d at 776-77 (Court administrator whose actions and authority derived from the Supreme Court's Order was entitled to quasi-legislative immunity). Moreover, Since I have dismissed Count II based on legislative immunity, I do not reach the other arguments posited by Defendants regarding Count II.

1. Is there an ongoing state proceeding involving the plaintiff that is judicial in nature;

2. Does the state proceeding implicate important state interests; and

3. Does the state proceeding afford an adequate opportunity to raise the federal claims.

Middlesex, 457 U.S. at 432; *Marks*, 19 F.3d at 882. When considering the same, it is important to note that abstention "is the exception and not the rule." *Marks v. Stinson*, 19 F.3d 873, 881 (3d Cir. 1994).

In analyzing the case under the standards set forth by the Supreme Court in Middlesex, Defendants acknowledge that Plaintiff alleges that his due process rights were violated during the IOLTA Board's determination of his request for an IOLTA exemption. Count III does not challenge the due process of the disciplinary proceedings currently pending against him. *See*, Plaintiff's Brief in Opposition, 9-10. Defendants, however, focus their cursory argument of Count III on whether the disciplinary proceeding meets the Younger abstention test rather than whether the IOLTA Board proceeding meets the test. I will not, *sua sponte*, critique an issue not properly analyzed by Defendants. Consequently, Defendants' Motion to Dismiss Count III based on a *Younger* abstention is denied.

Defendants additionally seek to dismiss Count III based on the argument that Plaintiff's Complaint fails to allege a protected liberty or property interest giving rise to a Fourteenth Amendment due process

claim. *See, Kentucky Dept. of Correction v. Thompson*, 490 U.S. 454, 460 (1989). In particular, Defendants assert that Plaintiff did not have a legitimate claim of entitlement to an exemption. As a result, Defendants assert that Count III should be dismissed.

In response, Plaintiff asserts that Defendants misunderstood his allegation and that the property interest at issue is Plaintiff's bar license. Defendants do not analyze whether Plaintiff's bar license is a property interest protected by the Fourteenth Amendment. I will not do so sua sponte. Therefore, Defendants' Motion to Dismiss Count III based Plaintiff's failure to allege a protected liberty or property interest giving rise to a Fourteenth Amendment due process claim is denied.

F. Count IV- Conspiracy under 42 U.S.C. §§1985(1) and 1983

Count IV of Plaintiff's Complaint alleges that Defendants McHugh, Thompson, Lehman, Mundy, Thomas, Goodman, Oxholm, Waftington, and Burd (the IOLTA Board members) conspired with Defendant Azen (the IOLTA Board Executive Director) to deprive Plaintiff of his First and Fourteenth Amendment rights in violation of 42 U.S.C. §1985(1) and 42 U.S.C. §1983. Defendants assert that Count IV should be dismissed for failure to set forth facts, rather than conclusions of law, sufficient to justify a conspiracy claim. Initially, I note that a cause of action for conspiracy "requires a separate underlying tort as a predicate for liability." *See, In re Orthopedic Bone Screw Products Liab. Litig.*, 193 F.3d 781,789 (3d Cir 1999) and cases cited therein. The reason behind this

principle is that §§1983 and 1985"are designed to compensate victims whose federal constitutional or statutory civil fights have been violated and to prevent future abuses of state power." *Lake v. Arnold*, 232 F.3d 360,369 (3d Cir. 2000). Since I have dismissed Plaintiff's First Amendment Count (Count II), Plaintiff's conspiracy claim cannot be based on an underlying First Amendment claim. Therefore, Defendants' Motion to Dismiss Count IV is granted in so far as it is related to Count II, Plaintiff's First Amendment claim. Plaintiff's Fourteenth Amendment Count (Count III), however, has survived Defendants' Motion to Dismiss. Therefore, I must continue my analysis to determine if Plaintiff's conspiracy claim based on his Fourteenth Amendment claim states a valid cause of action.

In stating a claim for conspiracy, a complaint must contain "allegations that the defendants directed themselves toward the unconstitutional action by virtue of a mutual understanding. Even where such allegations are made, they must further be supported by some factual allegations suggesting such a 'meeting of the minds.'" *Schmidt v. Borough of Stroudsburg*, 841 F.Supp. 639, 643 (M.D. Pa. 1993), *citing Kunik v. Racine County, Wis.*, 946 F.2d 1547 (7th Cir. 1991). To that end, the broad-ranging allegations of conspiracy must be supported with more than mere speculation and conjecture. *Young v. Kahn*, 926 F.2d 1369, 1405 n.16 (3d Cir. 1991); *Schmidt*, 841 F.Supp. at 642.

> "[Specifically, t]he plaintiffs must plead with particularity the 'circumstances' of the alleged wrongdoing in order to place the defendants on notice of the precise

> misconduct with which they are charged. Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the objects of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient .... [A]n inference [of conspiracy] ...from the Complaint...[is] no substitute for the requirement that the circumstances of the conspiracy be pleaded with specificity."

Loftus v. Southeastern Pennsylvania Transp. Auth., 843 F.Supp. 981,986-87 (E.D. Pa. 1994), *citing Rose v. Bartle*, 871 F.2d 331,366 (3d Cir. 1989). In other words, a complaint alleging a conspiracy should identify the individuals, the time frame, the specific or particular acts comprising the alleged conspiracy and state them in detail. *Id.*

Herein, Defendants assert that Count IV is based solely on conclusory statements without supporting facts. For example, Defendants assert that the following statements are conclusory:

> That the IOLTA Board and its executive director "conspired to injure Casella and his property on account of his lawful discharge of his duties as an attorney at law an in violation of 42 U.S.C. §1985."

> That the "Board members were aware of Casella's reasons for his exemption request...and his demand for a hearing...and summarily dismissed both without Casella's being granted the ability to make a case for a hearing."

> That although "[s]even of the 9 Board members are attorneys and know the requirements of due process," they nonetheless dismissed plaintiff's request for an exemption without affording him a hearing before the Board.

See, Complaint, Count IV. While I agree with Defendants that some of the statements made by Plaintiff in his Complaint are conclusions of law, I disagree that they are not supported by facts or stated with particularity demonstrating, at least at this stage, a *prima facie* case for conspiracy. To the contrary, I believe the Complaint states the individuals allegedly involved in the conspiracy (see, Complaint, 109-110), the time frame of the conspiracy (*see*, exhibits attached to Complaint setting forth a relevant time frame), and the alleged due process violation/scheme waged against him (see allegations contained in Count III and the numerous exhibits attached to complaint outlining the communications between the Defendants and between the Defendants and Plaintiff). Moreover, based on the articulate Brief in Support of the Motion to Dismiss, I believe that Defendants are fully aware, and are on notice, of the particulars of the alleged conspiracy sufficient to form an answer and defense. Consequently, Count IV of Plaintiff's Complaint as it relates to Plaintiff's Fourteenth Amendment violation is denied.

G. Count V- Fourth Amendment (Warrantless Searches)

Count V of Plaintiff's Complaint asserts a cause of action based on the Fourth Amendment. Specifically, Count V suggests that the IOLTA Rules

require him to sign a written "consent" authorizing his bank to disclose financial details of the IOLTA account to the IOLTA Board and that such a consent constitutes a violation of his Fourth Amendment right against warrantless searches. See, Complaint. Initially, Defendants argue that Count V should be dismissed based on a Younger abstention. In the alternative, Defendants argue that Count V should be dismissed because there has been no search, because Plaintiff has no expectation of privacy as it relates to his clients' monies, and his clients have no expectation of privacy. I will address Defendants' *Younger* abstention argument first.

1. Younger abstention

In analyzing the case under the standards set forth by the Supreme Court in Middlesex, Defendants again focus their argument of Count V on whether the disciplinary proceeding meets the Younger test rather than whether the IOLTA Board proceedings and rules meet the *Younger* test. As I stated earlier, I will not, *sua sponte*, critique an issue not properly analyzed by Defendants. Consequently, Defendants' Motion to Dismiss Count V based on a Younger abstention is denied.

2. Search and expectation of privacy

Defendants additionally assert that Count V should be dismissed because there is no expectation of privacy as it relates to the monies deposited in a bank under the Fourth Amendment, and therefore, there has been no search. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. Amend. IV. A search is an activity that intrudes upon a citizen's justifiable expectation of privacy. *Katz v. United States*, 389 U.S. 347 (1967). Therefore, if an activity does not constitute a search, then the Fourth Amendment does not apply and the conduct falls outside the protection of the Fourth Amendment. *Id.*

In this case, the activity alleged by Plaintiff is set forth by Rule 1.15 of the Pennsylvania Rules of Professional Conduct which require the Plaintiff to sign a written consent authorizing his bank to disclose financial records of his IOLTA account to the IOLTA Board. Yet, Plaintiff claims he has an expectation of privacy with regard to the same. The United States Supreme Court, in *United States v. Miller,* has held that a bank depositor has no legitimate expectation of privacy right in bank records under the Fourth Amendment. 425 U.S. 435 (1976). *Miller* is still the law of the land. *See, United States v. Zimmerman*, 957 F.Supp. 94 (N.D.W.V. 1997). The owners of the funds are Plaintiff's clients, not Plaintiff. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). Thus, Plaintiff is merely a fiduciary. 204 Pa. Code

§81.104. Therefore, neither Plaintiff nor his clients[6] have a legitimate expectation of privacy as it relates to the bank records under the Fourth Amendment.

Based on the aforementioned, therefore, I find that requiring Plaintiff to sign a written consent authorizing the bank to disclose financial records of the IOLTA accounts to the IOLTA Board is not a search triggering the Fourth Amendment's protection against unreasonable searches. Consequently, Count V of Plaintiff's Complaint is dismissed.

H. Defendants' Alternative Arguments

As to any remaining claims, Defendants assert they should be dismissed for the following reasons:

1. 11th Amendment Immunity for the IOLTA Board, the Disciplinary Board, and the Supreme Court of Pennsylvania;

2. IOLTA Board, the Disciplinary Board, and the Supreme Court of Pennsylvania are not persons under §1983 and therefore Plaintiff's §1983 claim must be dismissed as to those parties;

3. Qualified immunity for individual Defendants;

4. Plaintiff's requested remedy of an injunction is improper because Plaintiff cannot show that he is likely to prevail on the merits;

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[6] I note for clarification that Plaintiffs clients are not parties to this lawsuit.

5. Attorneys' fees under §1988 should be denied pursuant to *Kay v. Heeler*, 499 U.S. 432;

6. Punitive damages may not be awarded against Defendants in their official capacities; and

7. Punitive damages may not be awarded against Defendants in their individual capacities because Plaintiff has not alleged any evil intent on the part of Defendants or that they acted with reckless indifference.

The only remaining counts to the Complaint are Count III (Fourteenth Amendment violation) asserted only against the IOLTA Board, its members and its Executive Director, and Count IV (Conspiracy) asserted only against the individual IOLTA Board members and its Executive Director.

Thus, the only remaining Defendants are the IOLTA Board, the individual members of the IOLTA Board and its Executive Director. Therefore, my analysis of Defendants' alternative arguments will be limited to those specific remaining Defendants only.

1. Eleventh Amendment Immunity of the IOLTA Board

The Eleventh Amendment to the Constitution of the United States of America provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

> States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. The bar also extends to suits against a state by its own citizens, see *Hans v. Louisiana*, 134 U.S. 1 (1890), and to suits where, although the state is not named as a defendant, it "is the real, substantial party in interest." *Edelman v. Jordan*, 415 U.S. 651 (1974). The Eleventh Amendment does not, however, offer protection to "municipalities, counties, and other units of local government that are not agencies, instrumentalities, or arms of the state." *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1997).

Defendants assert that the IOLTA Board is entitled to 11th Amendment immunity. In determining whether the IOLTA Board is entitled to 11th Amendment immunity, I must assess whether the entity is the 'alter ego' of the state entitled to the protection of state immunity, or a district agency not so entitled." *Reiff v. Philadelphia Court of Common Pleas*, 827 F. Supp. 319, 322 (E.D. Pa. 1993), *citing Colon v. Hart*, 114 B.R. 390 (E.D. Pa. 1990) and *Flesch v. Eastern Pennsylvania Psychiatric Inst.*, 434 F.Supp. 963, 976 (E.D. Pa. 1977). The following criteria are relevant to the resolution of this matter:

> 1. Whether, in the event the plaintiff prevails, the payment of judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign

has immunized itself from responsibility for the agency's debts);

2. The status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and

3. What degree of autonomy the agency enjoys *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144-45 (3d Cir. 1995), *cert. denied*, 516 U.S. 932 (1995), *citing Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1350 (3d Cir. 1994), *cert. denied*, 115 U.S. 62 (1994). The burden of proving entitlement to Eleventh Amendment immunity lies with the party trying to assert it; in this case the IOLTA Board. *Id.*, 54 F.3d at 1144.

Defendants' alternative motion is denied simply because the Defendants failed to offer any substantive or meaningful analysis of the Eleventh Amendment immunity test. Their entire argument consists of one line: "To the extent that any defendants remain after the Court's consideration of the arguments above, any remaining claims against the IOLTA Board,..should be dismissed on the basis of Eleventh Amendment immunity as these are state entities." *See*, Brief in Support of Motion to Dismiss, pp. 22-23. Essentially, Defendants simply present this Court with a conclusory assertion. As stated by the Honorable Judge Sylvia Rambo, of the Middle District of Pennsylvania, "the net effect of this approach is to

put the Court in the position of doing the parties' work for them. This Court has a full docket and plenty of work of its own without having to do the lawyers' jobs for them." *Grossman v. Jiminez*, Civ. No. 91-0423, p. 5 (M.D. Pa. April 17, 1992); *see also Pennsylvania v. U.S. Dept. of Heath & Human Serv.*, 101 F.3d 939, 945 (3d Cir. 1996)(stating that conclusory assertions, unaccompanied by a substantial argument, will not suffice to bring an issue before the court).

2. Persons within the meaning of 42 U.S.C. §1983

Defendants assert that IOLTA Board should be dismissed from the case because they are not "persons" within the meaning of §1983. As of yet, the Third Circuit has not specifically addressed this issue. *See, Callahan v. City of Philadelphia*, 207 F.3d 668, 674 (3d Cir. 2000). *But see, Mattas v. Supreme Court of Pennsylvania*, 576 F. Supp. 1178 (W.D. Pa. 1983) (holding that Office of Disciplinary Counsel is not a "person" within the meaning of §1983, and thus cannot be sued thereunder). I agree with Defendant that the IOLTA Board is not a person within the meaning of §1983. *Mattas, supra.* Plaintiff does not oppose this conclusion in his Brief in Opposition. Thus, the IOLTA Board is dismissed from the remaining claim against it, the 14th Amendment claim. Thus, the 14th Amendment claim and the conspiracy claim are proceeding solely against the individual members of the IOLTA Board and its Executive Director.

3. Qualified immunity as to the individual Defendants

Defendants assert, as an alterative argument, that the individual Defendants should be dismissed because they are entitled to qualified immunity. This alternative motion is denied simply because the Defendants failed to offer any substantive or meaningful analysis of whether the individual Defendants are entitled to qualified immunity. Their entire argument consists of one line: "To the extent that any claims remain against any defendant sued in his or her individual capacity, those claims should also be dismissed because no defendant violated any clearly established rights of plaintiff, thus each is entitled to qualified immunity." *See*, Brief in Support of Motion to Dismiss, p. 23. Essentially, Defendants simply present this Court with a conclusory assertion. As stated by the Honorable Judge Sylvia Rambo, of the Middle District of Pennsylvania, "the net effect of this approach is to put the Court in the position of doing the parties' work for them. This Court has a full docket and plenty of work of its own without having to do the lawyers' jobs for them." *Gossman v. Jiminez*, Civ. No. 91-0423, p. 5 (M.D. Pa. April 17, 1992); *see also Pennsylvania v. U.S. Dept. of Heath & Human Serv.*, 101 F.3d 939, 945 (3d Cir. 1996)(stating that conclusory assertions, unaccompanied by a substantial argument, will not suffice to bring an issue before the court).

4. Injunction Remedy

Defendants assert that Plaintiff's requested remedy of an injunction is improper because Plaintiff cannot show that he is likely to prevail on the merits. The injunctive remedy is sought against the Pennsylvania Supreme Court and the

Disciplinary Board of the Supreme Court of Pennsylvania. Since both parties have been dismissed from the within matter, this issue is denied as moot.

5. Attorneys' fees under §1988

Defendants suggest that attorneys' fees should be denied pursuant to *Kay v. Ehrler*, 499 U.S. 432 (1991). In *Kay*, the Supreme Court of the United States held that an attorney who represents himself in a successful civil rights action may not be awarded reasonable attorney's fees under 42 U.S.C. §1988. Id. Such is the case here, wherein Plaintiff is an attorney representing himself seeking as a remedy his attorney's fees pursuant to §1988. Plaintiff has provided no argument in opposition of this conclusion. Therefore, Plaintiff's request for his attorney's fees pursuant to §1988 is dismissed.

6. Punitive damages

a. Against Defendants in their official capacities

Defendants argue that punitive damages may not be awarded against Defendants in their official capacities. Since the IOLTA Board has been dismissed, I find that the remaining individual Defendants could not have been acting in their official capacities thereby subjecting them to liability under §1983. *See, Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989)("neither a State nor its officials acting in their official capacities are "persons" under §1983"). Therefore, this issue is denied as moot.

b. Against Defendants in their individual capacities

Defendants argue that punitive damages may not be awarded against Defendants in their individual capacities because Plaintiff has not alleged that they acted with any evil intent or acted with recklessness or indifference. To recover punitive damages, a plaintiff must allege facts sufficient to support the allegation that the defendant acted with evil intent or acted with recklessness or indifference. *Smith v. Wade*, 461 U.S. 30, 46 (1983). I disagree with Defendants that the Complaint does not allege that the individual Defendants acted willfully and with callous disregard. *See*, Complaint, p. 20. Throughout the Complaint, Plaintiff sets forth factual allegations that, if taken as true, may lead a jury to conclude that the individual Defendants acted with recklessness or indifference. *See*, Complaint, 60-67; 108-114. Therefore, at this stage of the case, Defendants' alternative Motion to Dismiss Plaintiff's request for punitive damages as it relates to the IOLTA Board members and the IOLTA Board's Executive Director is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LAWRENCE J. CASELLA,
Plaintiff,

-vs-

Civil Action No. 00-1686
PENNSYLVANIA INTEREST ON LAWYERS TRUST ACCOUNT BOARD, et al,
Defendants.

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this 24th day of April, 2001, after careful consideration of Defendants' Motion to Dismiss Plaintiffs Complaint (Docket No. 5), it is hereby ORDERED that said Motion (Docket No. 5) is granted in part and denied in part as follows:

1. Defendants' Motion to Dismiss Counts I, II, and V is granted and said counts are hereby dismissed against all parties;

2. Defendants' Motion to Dismiss Count III Ls granted as to all parties except the individual members of the IOLTA Board and its Executive Director;

3. Defendants' Motion to Dismiss Count ill is denied as to the individual members of the IOLTA Board and its Executive Director;

4. Defendants' Motion to Dismiss Count IV is granted as to all Defendants as it relates to Plaintiffs First Amendment claim;

5. Defendants' Motion to Dismiss Count IV is denied as to the individual members of the IOLTA

Board and its Executive Director as it relates to Plaintiffs Fourteenth Amendment cla~rri;

6. Defendants' Motion to Dismiss the IOLTA Board based on 11"' Amendment Immunity is denied;

7. Defendants' Motion to Dismiss the ICLTA Board based on the assertion that the IOLTA Board is not a person under §1983 is granted;

8. Defendants' Motion to Dismiss the individual Defendants based on qualified immunity is denied;

9. Defendants' Motion to Dismiss Plaintiffs requested injunctive remedy is denied as moot;

10. Defendants' Motion to Dismiss Plaintiff's request for attorney's fees pursuant to 42 U.S.C. §1 988 is granted;

11. Defendants' Motion to Dismiss Plaintiffs request for punitive damages as against Defendants in their official capacities is denied as moot; and

12. Defendants' Motion to Dismiss Plaintiffs request for punitive damages as against the IOLTA Board and the IOLTA Board Executive Director, in their individual capacities, is denied:

Therefore, the only counts remaining are Counts ill and IV as against the individual members of the IOLTA Board and its Executive Director.

A status conference is set for May 4, 2001, at 9:00 a.m.

BY THE COURT:

Donetta W. Ambrose,

U.S. District Judge

APPENDIX F

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Notwithstanding paragraphs (a), (b) and (c), and except as provided below in paragraph (e), a lawyer shall place all funds of a client or of a third person in an interest bearing account. All qualified funds received by the lawyer shall be placed in an interest On Lawyer Trust Account in a depository institution approved by the Supreme Court of Pennsylvania. All other funds of a client or a third person received by the lawyer shall be placed in an interest bearing account for the benefit of the client or third person or in an other investment vehicle specifically agreed upon by the lawyer and the client or third party.

(1) Qualified funds are monies received by a lawyer in a fiduciary capacity that, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account.

(2) Depository institutions are financial institutions approved by the Supreme Court of Pennsylvania pursuant to Rule 221 of the Pennsylvania Rules of Disciplinary Enforcement.

(3) An Interest On Lawyer Trust Account (IOLTA Account) is an unsegregated interest-bearing deposit account with a depository institution for the deposit of qualified funds by a lawyer. The rate of interest payable on an IOLTA Account shall not be less than the rate paid by the depository institution on negotiable order of withdrawal accounts (NOW) or super negotiable order of withdrawal accounts. An account shall not be considered an IOLTA Account unless the depository institution at which the account is maintained shall:

(i) Remit at least quarterly any interest earned on the account in the IOLTA Board (as hereinafter defined).

(ii) Transmit to the IOLTA Board with each remittance a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from the account.

(iii) Transmit to the lawyer who maintains the IOLTA Account a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from the account.

(e) A lawyer shall be exempt from the provisions of paragraph (d) only upon exemption requested and granted by the IOLTA Board. Exemptions shall be granted if: (i) the nature of the lawyer's practice does not require the routine maintenance of a trust account in Pennsylvania; (ii) compliance with paragraph (d) would work an undue hardship on the lawyer or would be extremely impractical, based either on the geographical distance between the lawyer's principal office and the closest depository institution which is described in paragraph (d)(2), or in other compelling and necessitous factors; or (iii) the lawyer's historical annual trust account experience, based on information from the depository institution in which the lawyer deposits trust funds, demonstrates that service charges on the account would significantly and routinely exceed any interest generated.

(f) A lawyer shall not be liable in damages or held to have breached any fiduciary duty or responsibility because monies are deposited in an IOLTA Account pursuant to the lawyer's judgment

in good faith that the monies deposited were qualified funds.

(g) There is hereby created the Pennsylvania Interest On Lawyers Trust Account Board (herein called the IOLTA Board), which shall administer the IOLTA program. The IOLTA Board shall consist of nine members who shall be appointed by the Supreme Court. Two of the appointments shall be made from a list provided to the Supreme Court by the Pennsylvania Bar Association in accordance with its own rules and regulations. With respect to these two appointments, the Pennsylvania Bar Association shall submit three names to the Supreme Court, from which the Court shall make its final selections. The term of each member shall be three years and no member shall be appointed for more than two consecutive three year terms. The Supreme Court shall appoint a Chairperson. In order to administer the IOLTA program, the IOLTA Board shall promulgate rules and regulations consistent with this Rule for approval by the Supreme Court. Additionally, upon approval of the Supreme Court, the IOLTA Board shall distribute and/or expend IOLTA funds for the purpose set forth in this Rule. The IOLTA Board shall comply with the following:

(1) The IOLTA Board shall prepare an annual audited statement of its financial affairs.

(2) Disbursement and allocation of IOLTA Funds shall be subject to the prior approval of the Supreme Court, thus the IOLTA Board shall submit to the Supreme Court for its approval a copy of its audited statement of financial affairs, clearly setting forth in detail all funds previously approved for disbursement under the IOLTA program.

Additionally, a copy of the IOLTA Board's proposed annual budget will be provided to the Court, designating the uses to which IOLTA Funds are recommended.

(h) Interest earned on IOLTA Accounts (IOLTA Funds) may be used only for the following purposes:

(1) delivery of civil legal assistance to the poor and disadvantaged in Pennsylvania by non-profit corporations described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended;

(2) educational legal clinical programs and internships administered by law schools located in Pennsylvania;

(3) administration and development of the IOLTA program in Pennsylvania; and

(4) the administration of justice in Pennsylvania.

(i) The IOLTA Board shall hold the beneficial interest in IOLTA Funds. Monies received in the IOLTA program are not state or federal funds and are not subject to Article VI of the act of April 9, 1929 (P. L. 177, No. 175) known as The Administrative Code of 1929, or the act of June 29, 1976 (P. L. 469, No. 117).

204 Pa.Code § 81.104. Fiduciary Funds.

(a) Fiduciary funds are funds received by a lawyer in a fiduciary capacity from or on behalf of a beneficial owner. Pa.R.P.C. 1.15 requires the lawyer to maintain funds of a beneficial owner separate from the lawyer's own property, and to safeguard the funds appropriately. A lawyer may not personally profit from fiduciary funds. Fiduciary funds subject to these regulations arise from the

practice of law or from an activity described in Pa.R.P.C. 5.7.

(i) Arising from the practice of law: Fiduciary funds subject to these regulations are generated in connection with the lawyer's professional practice. Pa.R.P.C. 5.7 provides that all non-legal services which are not distinct from legal services are subject to Pa.R.P.C. Funds received in connection with non-legal services described in Pa.R.P.C. 5.7(a) are subject to Pa.R.P.C. 1.15(d). Factors which should be used to determine whether non-legal services are distinct from legal services include:

(1) whether funds received in connection with the non-legal services are maintained completely separate from funds received in connection with legal services;

(2) whether the attorney has advised the beneficial owner in clear, unambiguous terms that the attorney is acting in a non-legal capacity, and holding funds in a capacity other than as an attorney;

(3) whether the beneficial owner can reasonably expect to have the protection of the client-lawyer relationship cover the entire matter;

(4) whether the lawyer performs both legal and non-legal services from the same office; and

(5) whether the lawyer uses different letterhead in connection with legal and non-legal services.

(ii) Not arising from the practice of law: Some funds handled routinely by a lawyer, such as title insurance premiums or loan proceeds of a beneficial owner received by the lawyer in a non-lawyer capacity for immediate disbursement are not fiduciary funds, so long as the lawyer discharges his or her duty under Pa.R.P.C. 5.7 and

distinguishes funds received in a non-lawyer capacity from those received in the lawyer's capacity as such.

(b) Subaccounting refers to a process whereby fiduciary funds are segregated by the lawyer or the lawyer's depository institution by beneficial owner, and interest on each subaccount is separately calculated, reported, and paid to the beneficial owner. Subaccounting attributes all of the interest earned on the fiduciary account to the beneficial owners.

(i) Nothing in these regulations shall be construed to prohibit a lawyer from maintaining and administering a separate subaccount for each beneficial owner from whom fiduciary funds are received.

(ii) A lawyer who directly maintains a subaccounting system for fiduciary funds must comply not only with Pa.R.P.C. regarding such funds, but must also comply with applicable laws and regulations of the United States and of the Internal Revenue Service in particular.

(iii) Nothing in these regulations shall be construed to prohibit a lawyer from delegating to a depository institution the responsibility for maintaining and administering a separate subaccount for each beneficial owner from whom the lawyer receives fiduciary funds.

(c) Qualified funds: The lawyer should apply an economic benefits test to determine whether fiduciary funds are qualified funds. Fiduciary funds are not qualified funds if the lawyer will hold the funds for such a length of time, or if the fiduciary funds are of sufficient amount that the interest generated on the funds will exceed the cost of

administering a segregated account for the benefit of the beneficial owner.

(i) Law firm compliance v. lawyer responsibility: A lawyer who is an employee or member of a law firm that maintains an approved IOLTA account is presumed to be in compliance with IOLTA regulations when the lawyer uses only the law firm approved IOLTA account for the deposit of all qualified funds entrusted to him or her. However, the lawyer is ultimately responsible to assure that he or she is in compliance with Pa.R.P.C. 1.15 and these regulations.

(ii) Good faith judgment: A lawyer must use good faith judgment in determining whether fiduciary funds are qualified funds. A lawyer will not be liable for damages or be held to have breached a fiduciary duty because of funds deposited into an IOLTA account pursuant to the lawyer's judgment in good faith that the funds were qualified funds.

(iii) Nominal fiduciary funds: Funds that when considered alone are not large enough to earn interest for the beneficial owner thereof are qualified funds.

(iv) Funds held for a short time: Funds which are not expected to be held for sufficient time to provide interest for the beneficial owner are qualified funds.

(v) Factors which should be used to determine whether funds can reasonably be expected to generate interest for the beneficial owner include:

(1) the cost to the lawyer of establishing and maintaining account(s) benefitting beneficial owners;

(2) the account and bank service charges of the depository institution in which the account is maintained;

(3) the minimum deposit requirements of the depository institution in which the account is maintained;

(4) accounting fees incurred in connection with the funds;

(5) tax reporting requirement costs incurred in connection with the funds;

(6) the nature of the transaction(s) or proceeding(s) involved; and

(7) the likelihood of delay in the relevant transaction(s) or proceeding(s).

(d) Generally, a pooled fiduciary account which has a daily average balance of less than $3,500 will be exempt from IOLTA.

(e) Examples of fiduciary funds and qualified funds:

(i) Estates, trusts, guardianships, etc.: Not all fiduciary funds are qualified funds. Generally speaking, fiduciary funds held by a lawyer as a personal representative, trustee, guardian, attorney-in-fact or the like will not be qualified funds because the funds will either be in such an amount or held for such a period of time that interest generated on the funds will justify the expense of administering a segregated account.

(ii) Conveying accounts/real estate closings: Funds generated from real estate closings may be qualified funds, depending on whom the lawyer represents and whether the funds are nominal or held for a short period of time. Generally, these funds are held for a short period of time and are not expected to provide interest for the beneficial owner.

(iii) Advanced costs, fees, and refundable retainer accounts: Such advances are qualified funds when

they are nominal or held for a short period of time, and will remain qualified funds until earned/expended by the lawyer and thereby removed from the IOLTA account.

(iv) Proceeds from dispute settlements/lawsuits: Generally settlement funds are qualified funds if the settlement proceeds are nominal or held for a short period of time. If settlement proceeds are not qualified funds, they must be placed in interest-bearing status for the beneficial owner of the funds.

204 Pa.Code § 81.106. Exclusion and Exemptions from IOLTA Paticipation.

Certain lawyers, because of their employment, are excluded from Pa.R.P.C. 1.15. A lawyer who does not receive funds of a beneficial owner is excluded from IOLTA. Examples include lawyers employed full time in a corporate capacity, by local, state or federal government, as a law clerk, professor, or as a member of the judiciary. A lawyer who does not have an office in Pennsylvania, does not maintain fiduciary funds in depository institutions in the Commonwealth, and who is not otherwise required to maintain fiduciary funds in the Commonwealth is excluded from Pa.R.P.C. 1.15. A lawyer who is retired or no longer practices law need not maintain an IOLTA account.

Pa.R.P.C. 1.15(e) permits limited exemptions from the requirements of Pa.R.P.C. 1.15(d). No exemption is automatic, although exemptions will be routinely granted under specified circumstances. The Board may declare a lawyer exempt from the requirement of maintaining an IOLTA account; alternatively, a lawyer may submit a written request for exemption. Exemptions may be granted only

with respect to the maintenance of an IOLTA account for qualified funds; no other exemptions from Pa.R.P.C. 1.15(d) will be granted.

(a) Low balance account: Any pooled fiduciary account which historically, generally based upon 12 consecutive months of activity, has an average daily balance of Three Thousand Five Hundred ($3,500) Dollars or less will be exempt from being an IOLTA account. The Board may exempt from IOLTA, without application, a low balance account. A lawyer requesting an exemption based on a low balance account must, as a part of the written request for exemption, include an account analysis or written statement that demonstrates the amount of the average daily balance.

(b) Account service charges routinely exceed interest: Some fiduciary accounts may have an average daily balance of more than $3,500, but because of the account service charges or the interest rates of the depository institution, the charges will exceed interest earned on the account. In these cases, an exemption may be requested. A lawyer requesting an exemption based on these circumstances must, as part of the written request for exemption, include an account analysis or written statement that clearly shows the interest earned, or the interest that would have been earned, on the account each month for the past 12 months, plus the account service charges imposed on the account for each of the last 12 months.

(c) Extreme impracticality: Under limited circumstances it would be unduly burdensome for a lawyer to maintain an IOLTA account. When claiming undue hardship, the lawyer should provide appropriate details demonstrating undue

hardship. An example includes the lack of an approved depository institution that offers IOLTA accounts in the lawyer's geographical location.

(d) Interest waived by beneficial owner: An exemption from IOLTA will not be granted based on an agreement between a lawyer and beneficial owner purportedly waiving the beneficial owner's right to interest or granting the lawyer the power to direct interest earned on fiduciary accounts to the lawyer or to another person of the lawyer's choice. A beneficial owner may direct the lawyer to remit interest earned on fiduciary funds of that beneficial owner to a third party of the beneficial owner's choice, but interest earned under these circumstances would not be considered earned on qualified funds, and would create tax reporting responsibilities on the part of the lawyer.

(e) Other compelling and necessitous reasons: A lawyer who demonstrates a compelling and necessitous reason for not complying with IOLTA may request an exemption.

Lawyers exempt from maintenance of an IOLTA account are reminded that all other provisions of Pa.R.P.C. regarding property of beneficial owners, as well as all provisions of Pa. R.D.E. remain applicable to the lawyer.

204 Pa.Code § 81.107. Requests for Reconsideration.

(a) If the Board denies a lawyer's request for an exemption from maintenance of an IOLTA account, the lawyer may, within 30 days of written notice of denial from the Board, request in writing a reconsideration of the Board's decision. All requests for reconsideration shall set forth in detail

additional facts, if any, not brought before the Board in the request for exemption, as well as the reasons, if any, why an exemption should be granted.

(b) If the Board has determined that a lawyer is exempt from the requirement of maintaining an IOLTA account, the lawyer may, within 30 days of written notice from the Board that the lawyer is exempt, request in writing a reconsideration of the Board's decision. All requests for reconsideration shall set forth in detail facts, if any, why the lawyer should maintain an IOLTA account, and the manner, if any, in which the Board and the purposes of the IOLTA program will by furthered by the lawyer's maintenance of an IOLTA account.

(c) Notice shall be deemed to have been given to a lawyer under the provisions of subsections (a) and (b) of this Section 7 upon the deposit by the Board, postage prepaid, with the United States Postal Service of its written determination regarding the exemption, if any, of the lawyer from IOLTA.

(d) The Board may form a committee to determine exemptions from IOLTA or to reconsider exemption denials or determinations.

204 Pa.Code § 81.110. Violations.

The Board will refer to the Office of Disciplinary Counsel the name, address and circumstances surrounding any lawyer who, not being exempted from the maintenance of an IOLTA account, fails or refuses to comply with Pa.R.P.C. 1.15(d) and these regulations.

204 Pa.Code § 81.101. Definitions.

The following words and phrases when used in these regulations shall have the meanings given to them in this section unless the context clearly indicates otherwise:

Beneficial Owner—The client or third party whose funds are in the custody of a lawyer.

....

Good faith—Honesty in fact in the conduct or transaction concerned.

Interest on Lawyer Trust Account or IOLTA Account—An unsegregated interest-bearing checking account with a depository institution for the deposit of qualified funds by a lawyer.

...

Qualified Funds—Funds, whether cash, check, money order, or other negotiable instrument received by a lawyer in a fiduciary capacity which, in the good faith judgment of the lawyer, are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient interest income will not be generated to justify the expense of administering a segregated account. Qualified funds include funds received by a lawyer, as a lawyer, from any person.

....

204 Pa.Code § 81.110. Violations.

The Board will refer to the Office of Disciplinary Counsel the name, address and circumstances surrounding any lawyer who, not being exempted from the maintenance of an IOLTA account, fails or refuses to comply with Pa.R.P.C. 1.15(d) and these regulations.

Pennsylvania Constition, Article V, Section 10.

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

...

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignments and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

....

Pennsylvania Constitution, Article II, Section 1.

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives

62 Pa.C.S. § 4022. Legislative findings.

The General Assembly hereby finds that:

...

(3) Due to the reduction in Federal funds, the programs providing legal assistance in civil matters to indigent persons lack resources to adequately meet these persons, and it is necessary to provide a supplemental funding mechanism to accomplish this purpose.

No. 252 Disciplinary Docket No. 3, 543 Pa CXVII – CXXIV

IN RE: ESTABLISHMENT OF AN INTEREST ON LAWYER TRUST ACCOUNT PROGRAM

July 17, 1996

Effective September 1,1996

No. 252 Disciplinary Docket No 3

ORDER

PER CURIAM.

AND NOW, this 17th day of July, 1996, it is ordered pursuant to Article V. Section 10, of the Constitution of Pennsylvania that:

...

2. Rule 1.15 of the Pennsylvania Rules of Professional Conduct in hereby amended by adding paragraphs (d)-(i) as set forth in Annex A.

3. The Pennsylvania Rules of Disciplinary Enforcement are hereby amended to read as set forth in Annex B.

....

5. The IOLTA Board shall, to the extent not inconsistent with the provisions of this Order, the rules adopted by this Order and the rules adopted by the IOLTA Board, administer the IOLTA program to the extent practicable as a continuation of the program administered by the Lawyer Trust Account Board pursuant to the act of April 29, 1988 (P.L. 373, No. 59), known as The Interest on Lawyers Trust Accounts Act.

6. This Order, and the rule changes promulgated hereby, shall take effect on September 1, 1996.

....